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No. ~~696~~ 49

LAW STUDENTS CIVIL RIGHTS RESEARCH COUNCIL, INC., et al.,
Plaintiffs-Appellants,

v.

LOWELL WADMOND, et al.,
Defendants-Appellees.

STEPHEN MARTIN WEXLER, et al.,
Plaintiffs-Appellants,

v.

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT, et al.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

ALAN H. LEVINE
156 Fifth Avenue
New York, New York 10010

JEREMIAH S. GUTMAN
LEVY, GUTMAN AND GOLDBERG
363 Seventh Avenue
New York, New York 10001
Attorneys for Law Students Civil Rights Research Council, Inc., et al.

LEONARD B. BOUDIN
RABINOWITZ, BOUDIN & STANDARD
30 East 42nd Street
New York, New York 10017
Attorneys for Stephen Martin Wexler, et al.

AVID ROSENBERG
of Counsel

ctober 3, 1969

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JURISDICTIONAL STATEMENT

Appellants in the above-entitled consolidated cases, Law Students Civil Rights Research Council, Inc., Toby B. Golick, James C. Mauro, Jr., William H. B. Rodarmor, Stephen Martin Wexler, H. Gabriel Kaimowitz, Robert M. Cover, The Columbia Law Students Guild and The New York City Chapter of the National Lawyers Guild, having

appealed from a final judgment of a three-judge statutory court of the Southern District of New York entered on June 16, 1969 partially dismissing their complaints and partially denying their motions for injunctive and declaratory relief, submit this statement to show that this Court has jurisdiction of the appeal and that substantial questions are presented.

Opinions Below

The opinion of District Judge Motley convening the three-judge statutory court is reported at 291 F. Supp. 772 and is appended, *infra*, pp. 5a-13a. The majority opinion of the three-judge statutory court is reported at 299 F. Supp. 117 and is appended, *infra*, pp. 14a-40a and the partially concurring and partially dissenting opinion of Judge Motley is reported at 299 F. Supp. 133 and is appended, *infra*, pp. 40a-78a.

Jurisdiction

Appellants are three law students (Golick, Mauro and Rodarmor), three applicants to the New York Bar who are certified as having passed their bar examinations (Wexler, Kaimowitz and Cover), two organizations composed largely of law students and a third organization which is a New York City bar association.

Appellants filed their complaints in the Southern District of New York alleging that certain statutes and statewide judicial rules governing admission to the New York Bar, namely §90(1) of the New York Judiciary Law, Rules 9401, 9404 and 9406 of the New York Civil Practice Law and Rules, and Rule VIII of the Rules of the New York Court of Appeals for the Admission of Attorneys and Counselors-at-Law, contained in the New York Judiciary Law Appendix,[1] and their application through question-

[1] These statutes and judicial rules are reprinted in Appendix A, *infra*, pp. 1a-4a.

naires, regulations and practices instituted and administered by the appellees violate appellants' constitutional guarantees of personal privacy and freedom of speech, belief and association.

Appellants sought, pursuant to 42 U.S.C. § 1983, to enjoin the appellees from enforcing the statutes and judicial rules and from continuing to administer them by specified questionnaires, regulations and practices or by any means which contravene appellants' constitutional rights.

A three-judge statutory court was convened by District Judge Motley pursuant to 28 U.S.C. §§2281 and 2284. The cases were subsequently consolidated for hearing and decision by the statutory court.

On February 17, 1969, the statutory court, consisting of Circuit Judge Friendly and District Judges Bonsal and Motley rendered its decision partially dismissing the complaints and partially denying appellants' motions for a preliminary injunction, summary judgment and declaratory relief.

The majority below in an opinion written by Judge Friendly, ruled that the challenged statutes and judicial rules were constitutional on their face and that in large measure they were, except for a few of the appellees' regulations and practices, constitutional as applied. Judge Motley agreed with the majority that §90(1)(a) of the Judiciary Law was constitutional on its face but disagreed with the balance of the majority opinion. Final judgment embodying the court's determinations was entered on June 16, 1969 and is appended *infra*, pp. 79a-82a. A consolidated notice of appeal from this judgment was filed with the Clerk of the Southern District of New York by appellants on August 8, 1969.

Jurisdiction of this appeal is conferred by 28 U.S.C. §1253. The following cases sustain the Court's jurisdiction: *Schneider* v. *Smith*, 390 U.S. 17; *Zemel* v. *Rusk*, 381 U.S. 1; *Dombrowski* v. *Pfister*, 380 U.S. 479; *Baggett* v. *Bullitt*, 377 U.S. 360; *Shelton* v. *Tucker*, 364 U.S. 479.

Statutes Involved

The constitutional validity of New York Judiciary Law §90(1)(a) (hereinafter "Jud.L."), New York Civil Practice Law and Rules, Art. 94, Rules 9401, 9404 and 9406(1) (hereinafter "CPLR") and Rule VIII of the Rules of the New York Court of Appeals for the Admission of Attorneys and Counselors-at-Law contained in Jud. L. Appendix (hereinafter "Rule VIII") is here involved. The texts of these statutes and of Rule VIII are fully set forth in Appendix A, *infra*, pp. 1a-4a.

Questions Presented

Are applicants and prospective applicants to the New York Bar denied the freedom and privacy of their political and personal speech, beliefs, associations and activities and, further, are a class of their prospective clients, i.e., litigants who seek to redress deprivation of federal rights denied adequate and effective assistance of counsel and free access to federal and state courts by Jud. L. §90(1)(a), CPLR 9401, 9404, and 9406 and Rule VIII

(1) because, on their face, they establish an impermissibly vague and overbroad political test for admission to the Bar;

(2) because they impose upon every applicant for admission the burden of proving that (a) he believes in the form of government of the United States, and (b) is loyal to such government;

(3) because, under the threat of a perjury prosecution or delay in or disqualification from admission, they compel every applicant to submit to unlimited and indiscriminate personal and political interrogation without an adequate foundation or probable cause first having been established on the record; and

(4) because, as applied through questionnaires and other practices, they constitute an unconstitutionally broad, vague and indiscriminate inquiry into the personal and political life of each applicant.

Statement of the Case

Applicants to the New York Bar, as a prerequisite for admission, must submit to a political and personal screening process established by the above-mentioned statutes and judicial rules and administered by appellees.

Under Jud. L. § 90(1)(a) the appellee courts (hereinafter "Appellate Divisions") have the sole power to grant applications made in their respective jurisdictions for admission to the New York Bar.[2] Before granting admission, the Appellate Divisions must be satisfied that the applicant has proven that he "possesses the character and general fitness requisite for an attorney and counsellor-at-law [Jud. L. § 90(1)(a)] and "*believes in* the *form* of government of the United States and is *loyal* to such government" [CPLR 9406]. (Italics supplied).

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[2] The State of New York is divided into four judicial departments. N.Y. Const. Art. 6, § 4; Jud. L. §70. Admission in the department of residence is, as the Court below stated, "the key to lawful practice throughout the State", *infra*, p. 29a, since it authorizes practice before the New York Supreme Court sitting in any department and before the New York Court of Appeals.

In 1968, 1,522 applicants were admitted in the First and Second Judicial Departments comprising approximately 70 percent of the total admissions for that year throughout the State.

To enable the Appellate Divisions to carry out their responsibility, CPLR 9401 and 9404 authorize the appointment of the appellee Committees on Character and Fitness (hereinafter "Committees") . These Committees are delegated broad investigatory powers and the key adjudicatory role in determining the qualifications of applicants for admission under the New York scheme. See Rule VIII-1; CPLR 9401, 9404, 9406.[3]

CPLR 9404 provides that "unless otherwise ordered by the Appellate Division, no person shall be admitted to practice without a certificate from the proper committee that it has carefully investigated the character and fitness of the applicant and that, in such respects, he is entitled to admission."[3a] CPLR 9406(1) also directs the committees, like the Appellate Divisions, to withhold favorable action unless the applicant has furnished satisfactory proof that he believes in the form of and is loyal to the government of the United States.

The Committees' investigatory process, insofar as the complaints are concerned, involves three principal methods of inquiry: questionnaire, personal interview and third party "home life" affidavits.[4]

---

[3] See also *Willner* v. *Committee on Character and Fitness*, 373 U.S. 96, 104 discussing Rule 1(d) of the New York Rules of Civil Practice presently embodied in CPLR 9404, and where the Court concluded that "the role of the Committee is more than that of a mere investigator."

[3a] Under CPLR 9406, the Committees are charged, independently of the Appellate Divisions, with the duty of determining the applicant's political and other qualifications for receiving a certificate of admission.

[4] During the course of the litigation in the court below, the appellees narrowed somewhat the scope of the questionnaires and affidavits. However, at no time did appellees disclaim or deny either the validity or existence of the authority to reexpand the scope of inquiry. Nor did appellees give the court below any affirmative assurance that such an expansion would not occur. For

CPLR 9404 authorizes the committees, subject to the approval of the justices of the Appellate Division, "to prescribe and from time to time amend a form of statement or questionnaire on which the applicants shall set forth all the information and data required by the committee."[5]

The questionnaires in both Departments have customarily included broad inquiries into the applicant's associations, beliefs and activities.

Just prior to the commencement of these suits on June 16 and 17, 1968, the Appellate Divisions prepared a revised questionnaire which narrowed or eliminated some of the challenged interrogatories. Although the First Department had apparently distributed the revised questionnaires before these suits were filed, the Secretary of the Second Department's Committee stated in an affidavit dated November 12, 1968 that the revised questionnaires were only "now being distributed to applicants." See R. Doc. No. 17 [6] and *infra*, pp. 48a-49a. Despite the Second Department's delay and the fact that three other challenged inter-

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this reason and also because the appellants had already suffered irreparable injury as a consequence of the practices by the time they had been discontinued, we believe it is appropriate to present these challenged interrogatories and other practices which were in effect in the First and/or the Second Departments at the time the complaints were filed to demonstrate the scope of appellees' investigatory authorization.

Judge Motley illustrates the revisions that have been made in the challenged interrogatories and practices during the course of litigation. See *infra*, pp. 43a-47a, 49a-54a.

[5] Complete disclosure is absolutely required. Sanctions for failure "fully and accurately to disclose any fact or information called for by any question" are indicated by express warnings on the questionnaire that all answers are given under oath (and are thereby subject to the perjury provisions of N.Y. Penal Law § 210.00) and that such failure may result in denial or revocation of admission. See *infra*, pp. 37a, 48a, 73a.

[6] "R. Doc. No." refers to the enumerated documents which constitute the original record of the proceedings below filed with the Clerk of this Court.

rogatories were not deleted from the revised questionnaires by either Department until November 7, 1968,[7] the majority below decided the constitutional validity only of those interrogatories which remained in effect at the time of oral argument on November 13, 1968.[8] These interrogatories read as follows:

> 26. Have you ever organized or helped to organize or become a member of or participated in any way whatsoever in the activities of any organization or group of persons which teaches (or taught) or advocates (or advocated) that the Government of the United States or any State or any political subdivision thereof should be overthrown by force, violence or any unlawful means? If your answer is in the affirmative, state the facts below.
>
> 27(a). Do you believe in the principles underlying the form of government of the United States of America?
>
> (b) Can you conscientiously, and do you, affirm that you are without any mental reservation, loyal to and ready to support the Constitution of the United States?
>
> 31. Is there any incident in your life not called for by the foregoing questions which has any favorable or detrimental bearing on your character or fitness? If the answer is "Yes", state the facts.
>
> 32(a). Have you read the Canons of Ethics adopted by the American and New York State Bar Associations?
>
> (b) Will you conscientiously endeavor to conform your professional conduct to them?

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[7] See *infra*, pp. 32a and n. 6, 54a.

[8] See *infra*, pp. 32a-33a, 37a-38a, 39a n. 9.

Applicants are also required to obtain and submit to the Committees third-party affidavits relating personal observations of the applicant's "home life." See Jud. L. § 90 (1)(a) and Rule VIII-1. The forms for these affidavits were revised after commencement of these suits.[9] See *infra*, pp. 45a, 58a.

After submitting the questionnaire and third-party affidavits, each applicant is scheduled for a personal interview with a member of the Committee having jurisdiction over his application. The purpose of this interview is to explore areas of inquiry disclosed by the questionnaires, affidavits or other information independently obtained by the Committee. *Infra*, pp. 54a-55a.

Appellants instituted these actions for declaratory and injunctive relief, alleging that the political and personal screening process for admission to the New York Bar violated the rights of applicants and law students to the privacy of their associations, beliefs, speech and activities and to the exercise of these First Amendment guarantees free from penalizing or inhibiting regulation. Appellants also contended that the admission process has the further impermissible effect of culling out prospective attorneys having "controversial" political and social views with the result that a class of unpopular, segregated or poor litigants is deprived of effective and sympathetic assistance of counsel and free access to federal and state courts.

The court below rendered its decision on February 17, 1969 with Judge Motley concurring in part and dissenting in part. Final judgment was entered on June 16, 1969, partially granting the defendants' motion to dismiss the complaints and partially denying plaintiffs' motions for summary judgment and injunctive and declaratory relief.

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[9] Pertinent portions of the original and revised affidavit forms are set forth in Judge Motley's opinion, *infra*, pp. 43a-47a.

The majority ruled that Jud. L. § 90(1)(a), CPLR 9401, 9404 and 9406 and Rule VIII were constitutional on their face. Appellants' challenge to these provisions as applied was also rejected by the majority except as to Questions 26, 27(a) and 31, see *infra* at pp. 33a-37a.

The court ruled that Question 26 (*supra*, p. 8) should be limited to membership which coincides with organizational teaching or advocacy and "to cases where the applicant knew of the teaching or advocacy." *Infra*, p. 36a.[10]

In compliance with the court's order, the appellees offered to change Question 26 to read as follows:

> "26(a). Have you ever organized or helped to organize or become a member of any organization or group of persons which, during the period of your membership or association, you knew was advocating or teaching that the government of the United States or any State or any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means? If your answer is in the affirmative, state the facts below.
>
> (b). If your answer to (a) is in the affirmative, did you, during the period of such membership or association, have the specific intent to further the aims of such organization or group of persons to overthrow or overturn the government of the United States or any State of any political subdivision thereof by force, violence or any unlawful means?"[11]

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[10] The court below deferred final judgment for 90 days to permit the appellees time to evaluate their practices and report back to the court on the steps they would take to conform their practices with constitutional requirements. *Infra*, pp. 39a-40a.

Appellees filed their proposals on May 15, 1969 (R. Doc. No. 24). Appellants filed their opposition to these proposals on May 21, 1969 (R. Doc. No. 25).

[11] See R. Doc. No. 24. The court below made no mention in its judgment of whether it accepted or rejected appellees' revision of Question 26.

Question 27(a) (*supra*, p. 8) was found impermissibly vague. See *infra*, p. 33a. In the judgment (*infra*, p. 82a), the Court ordered that the question be reworded as follows:

> "27(a). Is there any reason why you cannot take and subscribe to an oath or affirmation that you will support the constitutions of the United States and of the State of New York? If there is, please explain." [12]

As for Question 31 (*supra*, p. 8) the majority held that it constituted a "catch-all" which had a "serious *in terrorem* effect." *Infra*, p. 37a. The court found "no interest of the state sufficiently compelling to require an applicant to engage in the soul-searching of his entire past life." *Ibid.*

The Questions Presented Are Substantial

1. Profoundly important questions are raised by this appeal regarding the power of the state to institute a screening program for admission to the bar which compels applicants to make unlimited disclosures of their political and personal associations, beliefs, speech and activities and which predicates disqualification upon the lawful exercise of First Amendment rights.

Screening programs similar to New York's are in operation in every state and in some federal jurisdictions.[13]

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[12] The court rejected appellees' proposed rewording (R. Doc. No. 24): "Do you believe in the constitutional form of government of the United States of America?"

[13] Two cases involving such screening programs are presently before this Court. See *Baird* v. *State Bar of Arizona, cert. granted* 394 U.S. 957 and *Application of Stolar*, No. 75 O.T. 1969, petition for certiorari pending, 38 U.S.L.W. 3002.

See generally Brown & Fassett, *Loyalty Tests for Admission to the Bar*, 20 U. of Chi. L. Rev. 480 (1953); Countryman & Finman,

These programs have incorporated the worst features of the loyalty-security programs prevalent during the so-called McCarthy period.[14]

This is the first case in the area of bar admissions to present a broad challenge to such screening programs, which in almost every other area of public benefits, licensing and employment have been sharply curtailed by the judiciary under this Court's leadership in recent years.[15]

More, however, is at stake in this case than the liberties and privacy of individuals. The Bar is imbued with an overriding national interest regarding the maintenance of its independence and for that reason it is a particularly unsuitable area in which to experiment with First Amendment freedoms.[16] Screening programs, such as New York's,

The Lawyer and Modern Society, 758, 822-884 (1966); Ginger & Koenigsberg, *Report on Rules for Admission to the Bar; Tests of Applicants' "Loyalty" and "Good Moral Character"*, 18 Law. Guild Rev. 58 (1958); 1 Emerson, Haber and Dorsen, *Political and Civil Rights in the United States*, 262-283 (1967); Note, *Inquiries Into the Political Beliefs and Activities of Applicants for Admission to the Bar*, 1 Columbia Survey of Human Rights 33 (1967-1968).

[14] See *In re Summers*, 325 U.S. 561; *Schware* v. *Board of Bar Examiners*, 353 U.S. 232; *Konigsberg* v. *State Bar*, 353 U.S. 252; *Konigsberg* v. *State Bar*, 366 U.S. 36; *In re Anastaplo*, 366 U.S. 82; *Application of Levy*, 214 F. 2d 331 (5th Cir. 1954) *rev'd* 348 U.S. 978; *Application of Patterson*, 302 P. 2d 227 (Ore. 1956); *Application of Levine*, 397 P. 2d 205 (Ariz. 1964); and generally Brown & Fassett, *supra;* Countryman & Finman, *supra; New York State Bar Assoc. Rept. of the Special Comm. on the Future Admission to Membership in the New York Bar of Persons of Doubtful Loyalty and the Continuation in Good Standing of Present Members Whose Loyalty is in Doubt* (Jan. 24, 1954), 68 Assoc. of the Bar of the City of New York, Pam. No. 17.

[15] See *e.g., Schneider* v. *Smith*, 390 U.S. 17; *United States* v. *Robel*, 389 U.S. 258; *Keyishian* v. *Board of Regents*, 385 U.S. 589; *Sweezy* v. *New Hampshire*, 354 U.S. 234; *Sherbert* v. *Verner*, 374 U.S. 398; *Kent* v. *Dulles*, 357 U.S. 116.

[16] See *NAACP* v. *Button*, 371 U.S. 415; *Konigsberg* v. *State*, 353 U.S. 252, 273; *Sanders* v. *Russell*, 401 F. 2d 241 (5th Cir. 1968). *Lefton* v. *City of Hattiesburg*, 333 F. 2d 280, 285, 286-287 (5th Cir. 1964); *Sobell* v. *Perez*, 289 F. Supp. 392, 399 (D. La. 1968).

directly threaten the independence of the Bar, state and federal, by inhibiting attorneys and prospective attorneys from associating with and representing unpopular groups or causes.[17]

Perhaps the broadest and most serious public and private consequences of these programs is their effect on the ability of minority and dissident groups to obtain vindication of federal rights in the courts. Moreover, in a particular sense these groups are also denied their rights to freedom of speech and association since their litigation is not solely an assertion of legal right, but, as this Court has recognized, frequently a mode of expressing their social and political beliefs. See *NAACP* v. *Button, supra* at 428-429, 431, 444-445; *Mine Workers* v. *Illinois State Bar Ass'n*, 389 U.S. 217; *Railroad Trainmen* v. *Virginia Bar*, 377 U.S. 1; Symposium, *The Right to Counsel and the "Unpopular Cause"*, 20 U. Pitt. L. Rev. 725 (1959).

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[17] See *NAACP* v. *Button, supra* at 430-438, 443-445; *Hacken* v. *Arizona*, 389 U.S. 143, 146, appeal dismissed (Mr. Justice Douglas dissenting); *Konigsberg* v. *State Bar*, 366 U.S. 36, 73-74 *and In re Anastaplo, supra* at 115-116 (Mr. Justice Black with whom Chief Justice Warren and Mr. Justice Douglas concur, dissenting); Pollitt, *Counsel for The Unpopular Cause*, 43 N.C.L. Rev. 9 (1964); Chafee, *Blessings of Liberty*, 157-176 (1956); *Loyalty Oaths for Lawyers*, Comm. on Law Reform, Assoc. of the Bar City of N.Y., 103 Reports No. 1017A (1950). See also Brief of the Attorney General of the United States as Plaintiff-Intervenor in *Sobell* v. *Perez, supra.*

The role played by law students in civil rights and civil liberties litigation, through the appellant organizations and otherwise, should be emphasized in calculating the impact of the New York program on the availability of counsel in these areas of law. Because of a shortage of lawyers, adequate assistance of counsel for poor persons, prisoners or the racially or politically oppressed, has come to depend directly on the services of law students. See generally *Johnson* v. *Avery*, 393 U.S. 483, 489 and n. 9, and 491 (Mr. Justice Douglas, concurring); *Hacken* v. *Arizona, supra;* Roberts, *Social Crisis and the Lawyer and Law Student: An Essential Meeting*, Villanova L. Rev. (Spring 1969).

2. In our view the First Amendment immunizes political beliefs, speech and association from inquisition or punishment by any agency government. See *Schneider* v. *Smith*, 390 U.S 17, 25.

Even if New York had an arguable, though in any event a remote, interest in excluding "disloyal" citizens from the practice of law, the destructive effect on personal and public interests noted above, particularly in the area of First Amendment freedoms, compels the state to choose a "less restrictive alternative" than the course followed here. See *Stanley* v. *Georgia*, 394 U.S. 557, 566-567; *United States* v. *Spock*, — F. 2d — (1st Cir., decided July 11, 1969) [slip opinion at p. 4, n. 5 (majority) and pp. 46-49 (Coffin, J., dissenting)]; and *infra*, p. 75a (Motley, J.).

Moreover, assuming that admission screening programs are ever proper, the New York scheme constitutes a direct violation of the principle announced by this Court in *NAACP* v. *Button*, 371, U.S. 415, 438 that

> "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms"

and reaffirmed many times, see *Aptheker* v. *Secretary of State*, 378 U.S. 500, 512, 513; *United States* v. *Robel*, 389 U.S. 258, 265; *Keyishian* v. *Board of Regents*, *supra* at 603-604.

The decision of the majority sanctioning New York's screening program is an unprecedented departure from the rule of "precision" in three major respects: (A) it permits New York to impose a vague and overbroad political test for admission, (B) it allows New York to place the burden of proving loyalty upon the applicant, and (C) it warrants New York to conduct an unlimited and indiscriminate search into the personal and political life of each applicant without probable cause.

A. *New York's Political Tests for Admission are Vague and Overboard.*

The substantive political tests for admission embodied in Jud. L. § 90(1)(a) and Rule VIII: "good moral character and general fitness" and in CPLR 9406(1): "believes in the form of government of the United States and is loyal to such government" are impermissibly vague and overboard.

a. Section 90(1)(a) and Rule VIII, in erecting a standard for judging political [18] as opposed to other characteristics of the applicant, "is wholly lacking in 'terms susceptible of objective measurement'." *Keyishian* v. *Board of Regents, supra,* at 604. This Court found in *Konigsberg* v. *State Bar,* 353 U.S. 252, 263, that the term "good moral character" is an "unusually ambiguous" and "vague qualification, which is easily adapted to fit personal views and predilections, [and] can be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law." The mere existence of such license is constitutionally intolerable in the area of free expression where the "standards for permissible statutory vagueness are strict." *NAACP* v. *Button, supra* at 432, 433; *Baggett* v. *Bullitt,* 377 U.S. 360, 374; *Speiser* v. *Randall,* 357 U.S. 513, 526.

In upholding § 90(1)(a) and Rule VIII against charges of vagueness the majority below relied upon the statement in the second *Konigsberg* case that the term "good moral character" could not "well be drawn in question" 366 U.S. at 40-41. *Infra,* p. 22a. But this Court noted there that the "good moral character" qualification had not been challenged by the applicant. 366 U.S. at 41. Moreover, as Judge Motley correctly points out, the quarrel here is over

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[18] See *Application of Cassidy,* 268 App. Div. 282, 51 N.Y.S. 2d 202 (2nd Dept. 1944) *aff'd without opinion* 296 N.Y. 926, 73 N.E. 2d 41 (1945) disqualifying an applicant for political unfitness under § 90(1)(a). See also Brown & Fasset, *supra* at p. 496.

the term "good moral character and general fitness" as a political test and not as a standard for trustworthiness or for other characteristics traditionally associated with professional ethics. *Infra*, pp. 62a-63a. See also *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 263-264 (Mr. Justice Frankfurter, concurring); *Hallinan* v. *Committee of Bar Examiners*, 421 P. 2d 76, 80-81 (Cal. 1966).

b. Equally vague are the terms of CPLR 9406(1): "form of government of the United States" and "loyal to such government." As Judge Motley demonstrated, this Court has found similar terms to be unconstitutionally vague in *Keyishian* v. *Board of Regents, supra* at 593 ("utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act"); and in *Baggett* v. *Bullitt*, 377 U.S. 360, 361, 371-372 ("respect for the flag and institutions of the United States . . . and undivided allegiance to the government of the United States"). See *infra*, p. 72a.

The restraints imposed by CPLR 9406(1) upon conscientious applicants are obvious. Applicants must speculate at their peril—perjury prosecution or delay, denial or, as a result of the continuing surveillance to which they are subjected, revocation of admission—as to the meaning of "form of government" and the nature of belief and loyalty thereto which CPLR 9406(1) requires them to possess.

In contrast to its ruling that CPLR 9406(1) was not unconstitutionally vague, the majority below reaches a contrary conclusion regarding an almost identically phrased oath, Question 27(a): "Do you believe in the principles underlying the form of government of the United States of America?" See *infra*, pp. 33a-34a.[19] The apparent distinction between the oath and CPLR 9406(1), at least as the majority saw it, was the presence of the word "principles" in the former and its absence in the latter.

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[19] Brown & Fassett, *supra* at 490-491 indicate that CPLR 9406(1) "is the basis for" Question 27(a).

Exclusion of the word "principles" makes CPLR 9406(1) no more constitutional than the oath. Furthermore, CPLR 9406(1) poses no less a danger to First Amendment rights than does the oath. It is a political test, which the applicant must meet, not merely by a single affirmation, but by undefined and unlimited evidentiary proof.

c. CPLR 9406(1) also suffers from impermissible overbreadth in two principal respects.

First, it explicitly conditions the Committee's certificate and the Appellate Division's final order for admission solely upon an applicant's political beliefs. New York has therefore chosen to tread heavily into a zone of privacy absolutely reserved to the individual. The decision below stands in direct conflict with the principle reaffirmed in *Stanley* v. *Georgia, supra,* of the inviolable sanctity of a "person's private thoughts", *id.* at 566. "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." *Id.* at 565. *Stanley* expressly adopted Mr. Justice Brandeis' dissenting opinion in *Olmstead* v. *United States,* 277 U.S. 438, 478, that the "makers of our Constitution . . . sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man." See also *Schneider* v. *Smith, supra* at 25; *Thomas* v. *Collins,* 323 U.S. 516, 531; *Cantwell* v. *Connecticut,* 310 U.S. 296, 303-304; *West Virginia* v. *Barnette,* 319 U.S. 624, 642; *American Communications Association* v. *Douds,* 339 U.S. 382, 412 and 446, 449 (Mr. Justice Black dissenting); *Torcaso* v. *Watkins,* 367 U.S. 488, 495-496; *Watkins* v. *United States,* 354 U.S. 178, 196; *Schneiderman* v. *United States,* 320 U.S. 118, 144; *Sweezy* v. *New Hampshire,* 354 U.S. 234, 266 (Mr. Justice Frankfurter concurring); *Speiser* v. *Randall,* 357 U.S. 513, 536 (Mr. Justice Douglas,

concurring); *Brandenburg* v. *Ohio*, 395 U.S. 444, 450 (Mr. Justice Douglas, concurring).

Second, CPLR 9406(1) is overboard because it excludes from admission all applicants who do not (or cannot prove that they) believe in the form of government of the United States. The majority below candidly interprets the phrase "form of government of the United States" to mean "the essentials, democratic government and change by lawful methods." See *infra* at p. 33a.

Obviously, then, the political test embodied in CPLR 9406(1) at the very least does not contemplate belief in or advocacy of violent overthrow of government, though such beliefs and advocacy are unquestionably protected by the First Amendment from criminal punishment, see *Scales* v. *United States*, 367 U.S. 203; *Noto* v. *United States*, 367 U.S. 290; *Yates* v. *United States*, 354 U.S. 298; *Brandenburg* v. *Ohio*, *supra* at 448-449, and from becoming the basis of a finding of moral unfitness, *Schware* v. *Board of Bar Examiners*, 353 U.S. 232; cf. *Keyishian* v. *Board of Regents*, *supra*, at 607.

The decision below in upholding CPLR 9406(1), which "sweeps within its condemnation speech which our Constitution has immunized from governmental control," *Brandenburg* v. *Ohio*, *supra* at 448 directly conflicts with the rulings of this Court in *Keyishian* v. *Board of Regents*, *supra*; *Elfbrandt* v. *Russell*, 384 U.S. 11; *Aptheker* v. *Secretary of State*, 378 U.S. 500; *Baggett* v. *Bullitt*, *supra*.

CPLR 9406(1) is not saved from the constitutional infirmity of overbreadth by arguing, as the majority below does, that the statute merely directs the admitting bodies to test whether an applicant can honestly take the constitutional oath of support.[19a] *Infra*, at 25a-26a.

[19a] Jud. L. § 466 requires each person, *upon being admitted to practice* by the Appellate Division, to take an oath set forth in N.Y. Const., Art. 13, § 1:

In *Bond* v. *Floyd*, 385 U.S. 116, this Court made it clear that First Amendment rights may not be restricted under the guise of testing the sincerity with which an individual can take an oath to support the Constitution and that the power to require such an oath "does not authorize a majority of the State legislators to test the sincerity with which another duly elected legislator can swear to uphold the Constitution." *Id.* at 132. New York's screening program authorizes just what *Bond* forbids; the sincerity with which an applicant can swear to support the constitution is tested by the orthodoxy of his political beliefs and through an unrelenting and unrestricted search of his political past.[20]

The constitutional oath, as involved in this case differs substantially from a prospective pledge of support, see *Knight* v. *Board of Regents*, 269 F. Supp. 339 (S.D.N.Y. 1967) *aff'd per curiam* 390 U.S. 36. Here, the constitutional oath, applied through the medium of CPLR 9406(1), is transformed into a retrospective loyalty test. This raises substantial questions as to whether the oath, as a test rather than a promise, meets First Amendment requirements of precision; see generally Note, *Loyalty Oaths*, 77 Yale L.J. 739 (1968) and whether it does not violate the constitutional proscription against bills of attainder and *ex post facto*

"I do solemnly swear (or affirm) that I will support the Constitution of the United States, and the Constitution of the State of New York, and that I will faithfully discharge the duties of the office of ————, according to the best of my ability."

[20] In *Bond* this Court expressed the fear that the power to judge loyalty " could be utilized to restrict the right of legislators to dissent from national or state policy or that of a majority of their colleagues." *Id.* at 132.

Such a fear is equally well-founded in the area of regulation of the Bar where repression of dissident political views has a long and unfortunate history. See *supra*, ftns. 13, 14. See also Brown & Fassett, *supra* at 495-496; 1 Emerson, Haber & Dorsen, *supra* at 262-283; 2 Chroust, *The Rise of the Legal Profession*, 5-8 (1965).

laws. See *Ex parte Garland*, 71 U.S. (4 Wall.) 333; *United States* v. *Brown*, 381 U.S. 437.

Finally, the majority below errs by acknowledging the imprecision of CPLR 9406(1), *infra*, pp. 25a-26a, and then nevertheless sustaining the statute on the assumption that it will be properly implemented by appellees. This is wholly insufficient protection for First Amendment rights; the very existence of a statute, which because of vagueness and overbreadth, "lends itself to selective enforcement" or "is susceptible of sweeping and improper application" will not be tolerated in the area of First Amendment freedoms. See *NAACP* v. *Button*, *supra* at 433, 435; *Whitehill* v. *Elkins*, 389 U.S. 54, 61-62; *Smith* v. *California*, 361 U.S. 147, 151; *Speiser* v. *Randall*, 357 U.S. 513, 526. Reliance upon the self-restraint of the appellees is wholly unacceptable. See *Baggett* v. *Bullitt*, 377 U.S. 360, 373-374.

B. *New York Imposes Upon Each Applicant the Burden of Proving His Loyalty.*

The majority below argues in the alternative; first CPLR 9406(1) does not unequivocally place the burden of proving loyalty on the applicant, and second, if it does, such a burden is not unconstitutional.

The first argument is answered simply by reference to the statute's wording which in contrast to the statutory provision considered in the second *Konigsberg* case is clear in this regard.[21] See Weinstein, Korn & Miller, *New York Civil Practice*, ¶ 9406.01-03 (1968). There is absolutely no indication that the authors of CPLR 9406 intended to exempt subsection (1) dealing with belief in and loyalty to

[21] Cal. Bus. & Prof. Code § 6064.1 merely provided that no person may be certified for admission to the California Bar "who advocates the overthrow of the Government of the United States or of this State by force, violence, or other unconstitutional means".

the form of government from the burden of proof requirement unquestionably applicable to subsections (2)-(4) dealing with citizenship, residence and other statutory and regulatory qualifications. See *Application of Lober*, 5 A.D. 2d 789 (2nd Dept. 1958); *Matter of Brennan*, 230 App. Div. 218, 219, 228 (2nd Dept. 1930).

The majority's alternative position is in direct conflict with *Speiser* v. *Randall*, 357 U.S. 513.

Judge Friendly attempts to avoid *Speiser's* force by arguing that, unlike applicants for tax exemption, candidates for bar admission are seeking a "public position, by virtue of which they could, if evilly motivated, create serious danger to the public safety." *Infra*, p. 23a, quoting from *Speiser* v. *Randall, supra*, at 527. But the premise of this argument has been thoroughly rejected by this Court. States may not condition governmental employment, licenses or benefits of any kind on the surrender of First Amendment rights. See *Keyishian* v. *Board of Regents, supra*, at 605-606; *United States* v. *Robel, supra*, at 264-266; *Aptheker* v. *Secretary of State*, 378 U.S. 500; *Schneider* v. *Smith, supra; Pickering* v. *Board of Education*, 391 U.S. 563, 568; *Schware* v. *Board of Bar Examiners, supra* at 239; and see also Reich, *The New Property*, 77 Yale L.J. 773 (1963); Van Alstyne, *The Demise of the Right—Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1968).[22] Nor is this case distinguishable from *Speiser* because infringement of First Amendment rights, here, is an unintended and incidental result

[22] *Garner* v. *Board of Public Works*, 341 U.S. 716; *Gerende* v. *Board of Supervisors*, 341 U.S. 56, and *American Communications Association* v. *Douds*, 339 U.S. 382 were distinguished in *Speiser* v. *Randall, supra* at 27. To the extent that these cases may have been thought to support the position of the majority below, we believe that they have been overruled in cases decided since *Speiser*. See *Keyishian* v. *Board of Regents, supra; United States* v. *Brown*, 381 U.S. 437; *Whitehill* v. *Elkins*, 389 U.S. 54.

of state regulation of the Bar. "For a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." *NAACP* v. *Button, supra* at 439; *Konigsberg* v. *State Bar,* 353 U.S. 252, 269; see also *Shelton* v. *Tucker,* 364 U.S. 479, 488-489.

The majority's assumption that a member of the bar is a public employee also raises a substantial question. See *Ex parte Garland, supra* at 378; *Spevack* v. *Klein,* 385 U.S. 511. A further problem arises from the majority's other unsupported assumption that lawyers, as such, pose a particular threat to the public safety. Even supposing that such dangers exist, New York may not protect its courts and the public by placing the burden of proving loyalty upon applicants or by employing other methods which deter the exercise of First Amendment rights where there is a "less restrictive alternative" available. *United States* v. *Robel, supra* at 265-268; *Aptheker* v. *Secretary of State, supra,* at 512-514; *Shelton* v. *Tucker, supra,* at 488-89; *United States* v. *O'Brien,* 391 U.S. 367, 381; *Schneider* v. *New Jersey,* 308 U.S. 147; Note, *Less Drastic Means and the First Amendment,* 78 Yale L.J. 464 (1969). As Judge Motley found below, contempt and disciplinary sanctions afford just such a precise, narrow and wholly adequate means of protection. See *infra,* p. 75a. Cf. *Stanley* v. *Georgia, supra* at 556-557; *United States* v. *Spock, supra.*[23]

The statutory burden of proof must also be constitutionally assessed in terms of its application. In their complaints, appellants alleged that the Committees utilize unorthodox associations, beliefs and activities disclosed by an applicant in the questionnaire or during the personal

[23] "The existing means of discovering and punishing illegal or professionally improper conduct, by presenting specific charges and supporting evidence, are ample . . . to meet any danger to our government or disgrace to our profession." *The Proposed Anti-Communist Oath: Opposition Expressed to Association's Policy,* 37 ABA J 123 (1951).

interview as the triggering device for extended interrogation and long delays in issuing a certificate of admission. See Brown & Fassett, *supra* at 493-494. Appellants further alleged that the Committees customarily require applicants to give a detailed factual explanation for the unorthodox behavior. The effect of this is impermissibly to cast the burden on the applicant of proving the legality of these associations, beliefs or activities. See *Dombrowski* v. *Pfister, supra,* at 494-496; *Haskett* v. *Washington,* 294 F. Supp. 912, 915, 916-917 (D.D.C. 1968) (Wright, *J.*, concurring); see also the remarks of Archibald Cox in *The Alleged Subversive Applicant,* 54 Brief 149, 162-164 (1959).

Question 26(a) (*supra,* p. 10) is the best example of this practice. An affirmative answer to subsection (a), without more, places upon the applicant the burden of explaining to the Committee's satisfaction that his was lawful association. See *infra,* pp. 69a-70a.

This practice is exacerbated by the absence of statutory or judicial standards for determining what information or lack of information reasonably supports continued inquiry; of stated procedures safeguarding the applicant's right to timely and adequate notice of charges, to counsel, and to confrontation and cross-examination; and of statutory or regulatory standards by which to test the reliability and sufficiency of evidence.

C. *New York Conducts An Unlimited Political Inquiry of Each Applicant Without Probable Cause.*

As applied, New York's statutory-judicial scheme authorizes a limitless and roving search into the personal and political life of every applicant.

This sweeping authorization plainly fails to meet the constitutional standard of "precision" in two fundamental

respects. First, it empowers the defendants to invade an applicant's privacy without probable cause or foundation for inquiry. Second, the statutory-judicial scheme authorizes the type of "unlimited and indiscriminate search" condemned by this Court in *Shelton* v. *Tucker, supra;* see also *Schneider* v. *Smith, supra* at 24.

a. Every applicant must, as a matter of course, submit to the political interrogation conducted by the defendants. No preliminary showing of cause based on facts peculiar to an individual applicant is required. In this respect the present case contrasts sharply with the second *Konigsberg* case where the Court noted that the state's inquiry was based upon independent information which it had received concerning the California applicant, *Konigsberg* v. *State Bar, supra* at 45.[24]

The absence of probable cause to compel even limited disclosures of political associations or activities violates the First Amendment. The majority below failed expressly to rule on this issue, but its decision conflicts with the position of this Court.

Thus, *Gibson* v. *Florida Legislative Committee,* 372 U.S. 539 stands as a barrier to the defendants' practices. In *Gibson,* the Court prohibited invasion of associational privacy in the absence of "an adequate foundation for inquiry"

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[24] This case also differs from *Konigsberg* v. *State Bar, supra* and *In re Anastaplo,* 366 U.S. 82, in the breadth of the present interrogatories as opposed to the comparatively narrow question involved in those cases of Communist Party affiliation which, for certain reasons, carried a presumed opprobrium. See *Gibson* v. *Florida Legislative Comm.* 372 U.S. 549. Though it need not be reached, a substantial question is raised concerning the validity of the second *Koningsberg* and *Antastaplo* decisions in light of the dissenting opinions in those cases and subsequent decisions of this Court. See *Gibson* v. *Florida Legislative Comm. supra* at 546; *Dombrowski* v. *Pfister, supra; Keyishian* v. *Board of Regents, supra.*

Id. at 557.[25] Such a foundation "is an essential prerequisite to demonstrating the immediate, substantial, and subordinating state interest necessary to sustain its right of inquiry . . ." *Id.* at 551. See also *Schneider* v. *Smith, supra.* This foundation must be established upon independent [*Sweezy* v. *New Hampshire, supra* at 255, 261 (Mr. Justices Frankfurter and Harlan Concurring)], relevant (*DeGregory* v. *New Hampshire Attorney General,* 383 U.S. 825, 830) and substantial evidence (*Gibson* v. *Florida Legislative Comm., supra* at 555-556 and n. 7; *Speiser* v. *Randall, supra* at 529). Cf. *Uphaus* v. *Wyman,* 360 U.S. 72, 79.

This case is an even stronger one than *Gibson* for requiring an adequate foundation. The defendants are not merely collecting data for future legislation, but are possessed of an adjudicatory power to determine whether an applicant has engaged in unlawful political conduct. See *Willner* v. *Committee on Character and Fitness,* 373 U.S. 96. Since a proceeding which involves such a determination is by its nature accusatory—the applicant is the target of investigation—absence of an adequate foundation violates the applicants' due process rights to notice of charges and to confrontation.[26] Cf *In re Ruffalo,* 390 U.S. 544, 550-551; *Jenkins* v. *McKeithen,* 395 U.S. 411.

The unjustified and unwarranted intrusion into the privacy of applicants would be a novel doctrine even if this case involved the most compelling state interests—public health and public safety. See *Camara* v. *Municipal Court,* 387 U.S.

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[25] In addition to the term "foundation", the Court also characterized the requirement by the descriptive terms: "nexus" and "probable cause". *Gibson* v. *Florida Legislative Committee, supra* at 546.

[26] In due process terms, there is no logical distinction between disbarment and denial of admission; both affect substantial, legal interests of the individual. See *In re Ruffalo,* 390 U.S. 544; cf. *Greene* v. *McElroy,* 360 U.S. 474; *Schneider* v. *Smith, supra* at 25; *Speiser* v. *Randall, supra* at 525-526; *Wieman* v. *Updegraff,* 344 U.S. 183, 190-191.

523; *See* v. *Seattle*, 387 U.S. 541; *Katz* v. *United States*, 389 U.S. 347; *Mapp* v. *Ohio*, 367 U.S. 643. In the First Amendment area such an intrusion is condemned as prior restraint. See *Marcus* v. *Search Warrant*, 367 U.S. 717; *A Quantity of Books* v. *Kansas*, 378 U.S. 205; *Freedman* v. *Maryland*, 380 U.S. 51; *Shuttlesworth* v. *Birmingham*, 394 U.S. 147, 155 n.4 and 159 (Mr. Justice Harlan, concurring).

b. The breadth of the defendants' investigatory power as authorized by New York's statutory-judicial scheme "pass[es] the outermost bounds of reason." *Schneider* v. *Smith, supra.* As exemplified by the questionnaires, the committees' authorization sanctions limitless interrogating of *every* applicant, under threat of perjury prosecution or delay or denial of admission. The inquiry, oral and written, may delve into *any* area, political, social, religious, professional, family, sexual or otherwise. See *infra* at pp. 43a-54a; Jackson, *Character Requirements for Admission to the Bar*, 20 Fordham L. Rev. 305, 316 (1951).[27]

This broad ranging inquiry rounds-up more information than is relevant or material, *Shelton* v. *Tucker, supra* at 488,

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[27] As Judge Motley, *infra*, pp. 49a-54a, illustrates, until recently the questionnaires specifically required each applicant to disclose *every* association, belief, speech, published writing and activity of *every* kind which he had ever made, held or been engaged in during his lifetime. Applicants were also required to write 100 word essays under oath on what they believe to be the "principles underlying the form of government of the United States." Compare Mr. Justice Fortas' concurring opinion in *Schneider* v. *Smith, supra* at 27.

In addition, after the commencement of these actions, appellees began to issue a form letter to applicants, who were required to fill in the address of their draft board and to sign it before a notary public. The letter authorized any of the appellees or their agents to have access to the applicant's Selective Service file for examination and copying. The majority noted "considerable doubt about the propriety of this" but refused to pass upon it because this practice was not specifically alleged in the complaints, *infra*, p. 39a, n. 9, although clearly within their scope.

and touches many areas in which the State has no legitimate interest at all. See *NAACP* v. *Alabama*, 357 U.S. 349; *Bates* v. *Little Rock*, 361 U.S. 516. Furthermore, as we have already demonstrated, see *supra*, pp. 17-18, "matters of belief are beyond the reach of subpoena or the probings of investigators." *Brandenburg* v. *Ohio*, *supra* at 456 (Mr. Justice Douglas, concurring); *Schneider* v. *Smith*, *supra* at 25.

The majority's rulings on questions 26 and 27(a) and (b) also raise substantial issues.

Subsection (a) of Question 26 (*supra*, p. 10) in seeking from the applicant full particulars concerning his "association" no matter how stale, with an unlimited number of organizations, whose purposes he must guess at his peril, suffers from the vice of overbreadth. See *Shelton* v. *Tucker*, *supra*; *Schneider* v. *Smith*, *supra* at 24-25 and 27 (Mr. Justice Fortas, concurring).

Furthermore, Question 26(a) is not restricted in its inquiry to organizations whose advocacy or teaching "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." See *Brandenburg* v. *Ohio*, *supra*, at 447 and n. 2, 448-449. "Statutes affecting the right of assembly, like those touching on freedom of speech, must observe the established distinctions between mere advocacy and incitement to imminent lawless action" *Id.* at 449 n. 4.[28]

Another serious deficiency in Question 26(a) involves the terms "advocating", "teaching" and "any unlawful

[28] Likewise, subsection (b) of Question 26 fails to take into account the element of "imminent danger" without which specific intent to further an organization's illegal aims is not criminal. See *Brandenburg* v. *Ohio*, *supra*; *Yates* v. *United States*, 354 U.S. 298, 321-322.

means" which are too vague. These terms fail to provide an adequate guide to an applicant giving a sworn statement, upon the accuracy of which both his professional career and his susceptibility to criminal prosecution depends. See *Keyishian* v. *Board of Regents, supra* at 600-601; *Boyle* v. *Landry*, 280 F. Supp. 938, 955, 964 (D. Ill. 1968) *prob. juris. noted*, 393 U.S. 974, *rearg. ordered*, 395 U.S. 955 Moreover, the applicant must take his chances in answering Question 26(a) that his evaluation of an organization's purposes coincides with the appellees'. No procedural safeguards exist to insure that the organization's aims are reliably determined by appellees. See *Dombrowski* v. *Pfister, supra* at 495-496; *Anti-Fascist Comm.* v. *McGrath*, 341 U.S. 123. In these circumstances the applicant must choose between over-disclosure or the unachievable: making certain, beforehand, that none of his associations fall under the question's coverage. See *Speiser* v. *Randall, supra* at 526.

Finally, as we have indicated earlier (*supra* p. 23), Question 26(a) is plagued by yet another fundamental defect. The question, even as revised, creates an unreasonable presumption of guilt through association against one who, knowing both the legal and illegal purposes of an organization, shares only the former. See *Brandenburg* v. *Ohio, supra; Baggett* v. *Bullitt, supra.* Thus it impermissibly shifts to the applicant the burden of proving lawful association, and more broadly, his loyalty. *Speiser* v. *Randall, supra; Dombrowski* v. *Pfister, supra* at 494-496; *Haskett* v. *Washington, supra* at 915 (Wright, *J.*, concurring).

Substantial problems are presented by the Question 27(a) as revised (*supra*, p. 11) and Question 27(b) upheld by the majority in its original form (*supra*, p. 8).

Revised Question 27(a), like Question 31 (*supra*, p. 8) requires the applicant "to engage in soul-searching of his entire past life", see *supra*, p. 11. The self-exorcism de-

manded by revised Question 27(a) is all the more pernicious because of its focus on political beliefs.[29]

Question 27(b) in forbidding an applicant to have "any mental reservation" regarding his loyalty to and support of the Constitution suffers from the same deficiencies as Question 27(a) revised because the unmistakable purpose of subsection (b), like subsection (a) is the suppression of wayward political beliefs. See also ftn. 29, *supra*.

The third-party affidavits raise important questions in view of this Court's staunch and unabating protection of the right to personal privacy. See *Griswold* v. *Connecticut*, 381 U.S. 479; *Stanley* v. *Georgia, supra; Katz* v. *United States, supra;* and generally 1 Emerson, Haber and Dorsen, *Political and Civil Rights in the United States, supra* at 1258-1264. As Judge Motley demonstrates, *infra* at pp. 43a-47a, the affidavit forms and instructions even though revised are nevertheless an unrestricted license to search an applicant's personal and family life.[30]

Overall, New York's complex scheme governing admission to the Bar, like the State's similarly "complicated and intricate scheme" for ferreting out disloyal teachers condemned in *Keyishian* v. *Board of Regents, supra,* is by the "very intricacy of the plan and the uncertainty as to the scope of its proscriptions . . . a highly efficient *in terrorem* mechanism." *Keyishian* v. *Board of Regents, supra,* at 601, 604.

3. We believe that infringement of the First Amendment rights of applicants is not so much the fault of appellees as it is the unavoidable consequence of their undertaking.

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[29] Question 27(a) revised may also be viewed as a test oath. As such, there is substantial question whether it is not too vague and whether it does not violate the constitutional proscription against *ex post facto* laws and bills of attainder.

[30] Judge Motley's analysis refutes Judge Friendly's unqualified and unquestioning conclusion that the "forms of these affidavits have recently undergone radical curtailment." See *infra*, p. 29a, n. 9.

For there is substantial question as to whether the power to determine political fitness can ever be delegated and administered with constitutional precision. In *Schware* v. *Board of Bar Examiners, supra*, this Court found that the standard for political disqualification requires a finding of moral turpitude in connection with illegal political conduct. *Id.* at 242-243.[31] The difficulty in defining or implementing this standard is compounded by the further requirement that the moral implications of an applicant's political conduct must be assessed in terms not only of contemporary but future community values. See *Schware* v. *Board of Bar Examiners, supra; Hallinan* v. *Committee of Bar Examiners*, 421 P. 76, 86-87 (Cal. S. Ct. 1966). Even if the appellees could exclude subjectivity from their judgments, the task of making such a determination is overwhelming especially in the area of political activities, where community standards are inevitably in a state of constant change. But, in reality, the power to review the morality of another's political conduct is an open invitation to caprice and arbitrariness.[32]

4. The majority erred in denying appellants' motion for an injunction against the statutes and judicial rules as applied through the questions, practices and regulations which were in effect at the time these suits were commenced but which ceased or were withdrawn before the court below rendered its decision. As Judge Motley correctly points out, these questions, practices and regulations only exemplified the scope of the appellees' investigatory-adjudicatory powers authorized by the challenged statutes and judicial rules. Therefore,

> "[t]he net effect of these changes and deletions . . . is to leave unchanged the First and Fourteenth Amend-

[31] Contrary to Judge Friendly's view, *infra*, p. 22a, the standard for political unfitness is, at the minimum, unlawful conduct. *Speiser* v. *Randall, supra* at 525-526; *Keyishian* v. *Board of Regents, supra* at 607.

[32] These problems are exacerbated by the fact that the appellees do not represent either a racial, economic, age, social or political cross-section of the community.

ment challenge to the statutes. "The substance of the statutory and regulatory complex remains and from the outset . . . [plaintiffs'] basic claim has been that they are aggrieved by its application." *Keyishian* v. *Board of Regents of State of New York*, 385 U.S. 589, 596, 87 S. Ct. 675, 680, 17 L. Ed. 629 (1967). See also, *Dombrowski* v. *Pfister*, 380 U.S. 479, 85 S. Ct. 1116, 14 L. Ed. 2d 22 (1965)." *Infra*, p. 49a.

Furthermore, there has been merely a cessation by the appellees of their long standing practices. Appellees have not and, as long as the statutory-judicial scheme exists, they can not give affirmative assurances that such practices will not reoccur. This Court has held that these circumstances, particularly in the First Amendment area, present an insufficient basis for denying an injunction. See *Southern Pacific Terminal Co.* v. *I.C.C.*, 219 U.S. 498, 515; *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 632-633; *Gray* v. *Sanders*, 372 U.S. 368, 376; *Moore* v. *Ogilvie*, 394 U.S. 814; *Carroll* v. *President and Commissioners of Princess Anne County*, 393 U.S. 175; *United States* v. *Concentrated Phosphate Export Assn.*, 393 U.S. 199.

5. The history of application of the challenged statutes and judicial rules demonstrates that this complex scheme does not contain adequate standards to confine the cast of appellees' investigative net within Constitutional boundaries. In effect, the apparent validity of these provisions on their face has been thoroughly undermined by their unconstitutionally sweeping application over a period of decades under the tacit, if not express, sanction of the New York Court of Appeals.

We believe that under these circumstances the statutory-judicial scheme should be treated as invalid on its face. An injunction should issue restraining the enforcement of the challenged statutes and judicial rules until they are revised expressly to provide for procedural safeguards and substantive limitations.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted,

ALAN H. LEVINE
156 Fifth Avenue
New York, New York 10010

JEREMIAH S. GUTMAN
Levy, Gutman and Goldberg
363 Seventh Avenue
New York, New York 10001
Attorneys for Law Students Civil Rights Research Council, Inc., et a

LEONARD B. BOUDIN
Rabinowitz, Boudin & Standard
30 East 42nd Street
New York, New York 10017
Attorneys for Stephen Martin Wexler, et al.

DAVID ROSENBERG
of Counsel

October 3, 1969

APPENDIX A

Statutes and Judicial Rules Involved

New York Civil Practice Law and Rules

Article 94—Admission to Practice

RULE 9401. Committee

The appellate division in each judicial department shall appoint a committee of not less than three practicing lawyers for each judicial district within the department, for the purpose of investigating the character and fitness of every applicant for admission to practice as an attorney and counselor at law in the courts of this state. Each member of such committee shall serve until his death, resignation or the appointment of his successor. A lawyer who has been or who shall be appointed a member of the committee for one district may be appointed a member of the committee for another district within the same department.

RULE 9404. Certificate of character and fitness

Unless otherwise ordered by the appellate division, no person shall be admitted to practice without a certificate from the proper committee that it has carefully investigated the character and fitness of the applicant and that, in such respects, he is entitled to admission. To enable the committee to make such investigation the committee, subject to the approval of the justices of the appellate division, is authorized to prescribe and from time to time to amend a form of statement or questionnaire on which the applicant shall set forth all the information and data required by the committee and the appellate division justices, including specifically his present and such past places of actual residence as may be required by the committee and the appellate division, listing the street

and number, if any, and the period of time he resided at each place.

RULE 9406. Proof

No person shall receive said certificate from any committee and no person shall be admitted to practice as an attorney and counselor at law in the courts of this state, unless he shall furnish satisfactory proof to the effect:

1. that he believes in the form of the government of the United States and is loyal to such government;

2. that he is a citizen of the United States;

3. that he has been an actual resident of the state of New York for six months immediately preceding the submission of his application for admission to practice and that such residence has continued until the final disposition of the application for admission to practice; and

4. that he has complied with all the requirements of this rule and with all the requirements of the applicable statutes of this state, the applicable rules of the court of appeals and the applicable rules of the appellate division in which his application is pending, relating to the admission to practice as an attorney and counselor at law.

JUDICIARY LAW § 90(1)(a):

§ 90 Admission to and removal from practice by appellate division; character committees.

1. a. Upon the state board of law examiners certifying that a person has passed the required examination, or that the examination has been dispensed with, the appellate division of the supreme court in the department to which such person shall

have been certified by the state board of law examiners, if it shall be satisfied that such person possesses the character and general fitness requisite for an attorney and counsellor-at-law, shall admit him to practice as such attorney and counsellor-at-law in all the courts of this state, provided that he has in all respects complied with the rules of the court of appeals and the rules of the appellate divisions relating to the admission of attorneys.

NEW YORK JUDICIARY LAW: Appendix:

Rules of the Court of Appeals for the Admission of Attorneys and Counselors-at-Law.

Rule VIII. Proof of Moral Character.

VIII-1. General Regulation.

Every applicant for admission to the Bar must produce before a Committee on Character and Fitness appointed by an Appellate Division of the Supreme Court and file with such Committee evidence that he possesses the good moral character and general fitness requisite for an attorney and counselor-at-law as provided in Section 90 of the Judiciary Law, which must be shown by the affidavits of two reputable persons residing in the city or county in which he resides, one of whom must be a practicing attorney of the Supreme Court of this State.

VIII-2. Supporting Affidavits.

Such affidavits must state that the applicant is, to the knowledge of the affiant, a person of good moral character and must set forth in detail the facts upon which such knowledge is based. Such affidavits shall not be conclusive, and the court may make further examination and inquiry through its Committee on Character and Fitness or otherwise.

VIII-3. Certificate of Board of Law Examiners.

Every applicant who pursued the study of law pursuant to these Rules must file with such Committee on Character and Fitness his certificate from the State Board of Law Examiners showing compliance with these Rules.

VIII-4. Discretion of Appellate Division.

The justices of the Appellate Division in each department shall adopt for their respective departments such additional rules for ascertaining the moral and general fitness of applicants as to such justices may seem proper.

APPENDIX B

Opinion of Judge Motley

UNITED STATES DISTRICT COURT

S. D. New York

Sept. 25, 1968

Nos. 68 Civ. 2917; 68 Civ. 2938

Law Students Civil Rights Research Council Inc., *et al.*

v.

Wadmond, *et al.*

Stephen Martin Wexler, *et al.*

v.

The Supreme Court of the State of New York, Appellate Division, First Judicial Department, *et al.*

Memorandum Decision and Order for Three Judge Court

Motley, District Judge.

Plaintiffs in these two actions attack the constitutionality of certain New York statutes, rules and regulations relating to the character and fitness of those seeking admission to the New York bar. More specifically, plain-

tiffs claim, inter alia, that rights guaranteed them by the First and Fourteenth Amendments to the Federal Constitution are being violated by defendants' enforcement of the statutory and regulatory provisions under attack. Plaintiffs say that these statutes, rules and regulations are unconstitutional on their face and as applied.

The first statute in question is the New York Judiciary Law, McKinney's Consol. Laws, c. 30, § 90(1). That statute confers upon the Appellate Division of the Supreme Court in each Judicial Department the power to admit applicants to the bar upon the state board of law examiners certifying to it that the applicant has passed the required examination. The statute decrees that the Appellate Division shall admit such person to practice "if it shall be satisfied that such person possesses the character and general fitness requisite for an attorney and counselor-at-law." The statute also contains the proviso that the applicant shall be admitted to the bar only if he has complied with the rules in all respects of the Court of Appeals of the State and the Appellate Division.

The Appellate Division is directed by statute (New York Civil Practice Law and Rules, Rule 9401) to appoint a committee for each Appellate Division District "for the purpose of investigating the character and fitness of every applicant for admission to practice." Every application for admission by a person who has been certified by the state board of law examiners must be referred to the committee for the district in which such person actually resides. (New York CPLR, Rule 9402). Unless otherwise ordered by the Appellate Division, "no person shall be admitted to practice without a certificate from the proper committee that it has carefully investigated the character and fitness of the applicant and that, in such respects, he is entitled to admission." (N.Y.C.P.L.R., Rule 9404). "To enable the committee to make such investigation the committee,

subject to the approval of the justices of the appellate division, is authorized to prescribe and from time to time to amend a form of statement or questionnaire in which they shall set forth * * * all the information and data required by the committee and the appellate division justices." (N.Y. C.P.L.R., Rule 9404). The committee is enjoined by statute from issuing its certificate to any person and the Appellate Division is precluded by the same law from admitting any person to practice, unless such person, inter alia, shall furnish satisfactory proof to the effect "that he believes in the form of the government of the United States and is loyal to such government." (N.Y.C.P.L.R., Rule 9406).

Rule VIII of the Rules of the Court of Appeals For Admission of Attorneys and Counselors-At-Law (Judiciary Law-Appendix) requires every applicant to "produce before a Committee on Character and Fitness * * * and file with such Committee evidence that he possesses the good moral character and general fitness requisite for an attorney and counselor-at-law as provided in Section 90 of the Judiciary Law, which must be shown by the affidavits of two reputable persons residing in the city or county in which he resides."

Plaintiffs in 68 Civ. 2938 allege in their complaint that the Judiciary Law § 90, C.P.L.R. Rules 9401-9406, and Rule VIII of the Court of Appeals lack sufficient standards and are in violation of, inter alia, the First and Fourteenth Amendments.[1]

With greater specificity, these plaintiffs allege that Rule 9406: 1) improperly requires an applicant to bear an unlimited and indefinite burden of proof of his belief in and loyalty to the form of our government; 2) is unreasonably vague; and 3) improperly makes belief in our form of government a condition of admission to the bar.

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[1] Complaint, para. 15(a).

Also, plaintiffs say belief in our form of government is not reasonably related to the legitimate objectives of the state in determining character and fitness.[2]

Plaintiffs in 68 Civ. 2938 then assail in their complaint certain questions propounded by the Committees on Character and Fitness of the First and Second Departments of the Appellate Division in their questionnaires. Examples of the questions under attack are the following:

> "20. Have you participated in activities of a public or private nature or in philanthropic, religious, or social services? If so, state fully.
>
> "21(A). Give the names, addresses, objects of and period of membership in each and every club, association, society or organization of which you are or have been a member."[3]
>
> * * * * * *

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[2] Complaint, para. 15(b).

[3] Questions 20 and 21(A) appearing in Questionnaire of First Department. Other questions attacked are:

> "22. (A) Are you now or have you ever been a member of or affiliated in any way with any of the organizations or groups listed as subversive by the Attorney General of the United States?
>
> (B) Have you paid dues to, contributed in any way or signed a petition for any such organization or group?
>
> If your answer is yes to either subdivision of this question, give the following information:
>
> Name and address of organization or group * * *
>
> When you became a member or affiliated with it * * *
>
> Period of your association or connection with it * * *
>
> How and why you became associated or connected with it * * *
>
> How and why you severed your connection with it, if you did."
>
> "23. Have you ever participated in any way whatsoever in the activities of such organizations or groups? If so, to what extent."

"32. Have you written any articles for publication? If so, give the circumstances, the name of publication, the date of publication, and the title and subject matter of the article.

* * * * * *

"36. (a) Are you now, or have you ever been at any time (including the time during which you attended high school, college and law school, and including the time during which you engaged in military service or any community activity) a member of any club, association, society or organization or political party.

(b) If answer be yes, give the name, address and objects of each and every such club, association, society or organization or party and state the period of your membership and your position or title therein."[4]

The foregoing questions are challenged on the ground that they violate the First and Fourteenth Amendments. Plaintiffs say that they are: 1) overbroad and without reasonable limitation; 2) compel disclosure of political beliefs, associations, speech and activities protected by the First Amendment and make such factors relevant in determining admission to the bar; 3) compel disclosure of re-

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[4] Questions contained in Questionnaire of Second Department. Other questions attacked are:

"35. (a) Are you pledged now or have you ever been pledged to aid in effecting changes in our form of government by force or violence or any other unlawful means?

(b) Are you now or have you ever been a member of any party or organization created for such purpose or for the propagandizing or the furtherance thereof?

(c) If answer is yes, state the name of the party or organization.

(d) Are you now, or have you ever been, a member of the Communist Party, or have you ever been enrolled as a member of the Communist Party?

ligious activities, beliefs and associations and likewise make such factors considerations in determining admission to the bar.[5]

Plaintiffs in 68 Civ. 2938 attack the constitutionality of the oaths required in the Committees' Questionnaires on virtually the same constitutional grounds set forth above.[6] The oaths required by the First Department are:

> "24(A) Do you believe in the principles underlying the form of government of the United States? State on a rider, in not less than 100 words, what you believe those principles to be.
>
> (B) Can you conscientiously and do you affirm that you are, without any mental reservations, loyal to the Government of the United States?"

The oaths required by the Second Department are as follows:

> "33. Do you believe in the principles underlying the form of government of the United States? Briefly state the reasons for your answers.
>
> "34. Do you conscientiously affirm (without any mental reservation) that you are loyal to the Government of the United States of America?"

Plaintiffs challenge on similar constitutional grounds the content of the personal interviews of applicants required by the Committees. Plaintiffs claim that improper inquiry is often made concerning applicant's First Amendment activities.[7]

Finally, plaintiffs assail the practice of the Committees in requiring applicants to obtain and submit affidavits of "character and home life" on the ground that this practice

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[5] Complaint, para. 15(c) and (d).

[6] Complaint, para. 15(e).

[7] Complaint, para. 16(a).

constitutes an unlimited and indiscriminate invasion of the applicants' privacy in violation of the Fourth and Fourteenth Amendments.[8] Similar allegations are made in the complaint in 68 Civ. 2917.[9]

Plaintiffs in both cases claim that the foregoing statutes, rules, regulations and practices have the effect of deterring and inhibiting the exercise of rights of speech, association and belief guaranteed by the First Amendment.

The relief sought by plaintiffs in each action is a declaratory judgment declaring the above statutes, rules, questions and practices unconstitutional and a permanent injunction enjoining defendants from enforcing same.

These actions are before this court on motions by plaintiffs to convene three-judge courts pursuant to 28 U.S.C. § 2281 et seq. Plaintiffs in 68 Civ. 2917 also move to consolidate the two suits pursuant to Rule 42(a), Fed.R. Civ.P. The latter motion and the motion to convene a three-judge court in 68 Civ. 2917 were referred to this court, with consent, by Judge Wyatt on August 27, 1968.

Only a three-judge district court operating under 28 U.S.C. § 2284 may enjoin the enforcement or execution of a state statute as unconstitutional. Such court must be convened where the constitutional issue or issues are not wholly insubstantial or obviously without merit. Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713, 82 S.Ct. 1294, 8 L.Ed.2d 794 (1962); Green v. Board of Elections of City of New York, 259 F.Supp. 290 (S.D.N.Y. 1966), aff'd 380 F.2d 445 (2d Cir. 1967), cert. denied, 389 U.S. 1048, 88 S.Ct. 768, 19 L.Ed.2d 840 (1968). Without in any way passing on the substantiality of other constitutional issues raised by plaintiffs, the court finds certain of the constitutional issues not wholly insubstantial.

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[8] Complaint, para. 16(b).

[9] See paragraphs 6, 8, 9, 10.

C.P.L.R. Rule 9406 requires an applicant for admission to the bar to prove his belief in the form of the government of the United States and his loyalty. A substantial constitutional question is raised as to whether placing the burden of proof on the applicant will not deter speech and association protected by the First and Fourteenth Amendments when the consequences of failure of proof are severe and the matter to be proved is difficult of definition. Speiser v. Randall, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958)

A substantial question is raised as to whether the language of C.P.L.R. Rule 9406 and the required oaths is unconstitutionally vague or broad and consequently infringes upon First Amendment freedoms. Baggett v. Bullitt, 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964); Elfbrandt v. Russell, 384 U.S. 11, 86 S.Ct. 1238, 16 L.Ed.2d 321 (1966); Keyishian v. Board of Regents, etc., 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967); Whitehill v. Elkins, 389 U.S. 54, 88 S.Ct. 184, 19 L.Ed.2d 228 (1967).

The questions set forth above which are contained in the Character Committees' Questionnaires call for a broad disclosure of all of the applicant's activities and associations. A substantial constitutional question is raised as to whether the threat of such disclosure will not deter the prospective member of the bar in his associations while in college and law school in violation of the First and Fourteenth Amendments; Shelton v. Tucker, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960); Schneider v. Smith, 390 U.S. 17, 88 S.Ct. 682, 19 L.Ed.2d 799 (1968).

Plaintiffs also make an adequate showing of the need for equitable relief. The nature of the wrong claimed is a "chilling" of speech and association while in college and law school, and the wrong claimed would not be remedied by an attack on the regulatory scheme during the process

of admission when the damage had been done. Dombrowski v. Pfister, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965).[10]

Accordingly, the motions to convene three-judge courts are granted and the cases are referred herewith to the Chief Judge of the Circuit. 28 U.S.C. §2284.

The plaintiffs' motion in 68 Civ. 2917 to consolidate the two suits under Rule 42(a), Fed.R. Civ.P., is improperly presented at this time. The power of a single district judge in hearing an application to convene a three-judge court is limited to the jurisdictional inquiries of whether a substantial constitutional question is presented, a basis for equitable relief is presented, and 28 U.S.C. § 2281 is otherwise complied with. Green v. Board of Elections of City of New York, supra, 259 F.Supp. at 292; Idlewild Bon Voyage Liquor Corp. v. Epstein, supra, 370 U.S. at 715, 82 S.Ct. 1294. Such a motion might be heard by a single judge of the three-judge court after it is appointed, but then the decision by the single judge is subject to the safeguard of review by the full court before final hearing of the suit, 28 U.S.C. § 2284(5). The motion to consolidate is denied without prejudice to its renewal before either three-judge court.

So ordered.

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[10] The individual plaintiffs in 68 Civ. 2917 are presently law students and plan to apply for admision to the New York bar. One of the organizational plaintiffs in 68 Civ. 2938 is composed of law students similarly situated. The individual plaintiffs in 68 Civ. 2938 have passed New York's written bar exam and allege infringement of their political and civil rights while awaiting admission.

APPENDIX C

Opinion of the District Court for the Southern District of New York

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

February 17, 1969

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LAW STUDENTS CIVIL RIGHTS RESEARCH COUNCIL, INC., *et a*

v.

WADMOND, *et al.*.
STEPHEN MARTIN WEXLER, *et al.*

v.

The SUPREME COURT OF THE STATE OF NEW YORK, APPELLA
DIVISION, FIRST JUDICIAL DEPARTMENT, *et al.*

68 Civ. 2917, 2938.

—o—

Before FRIENDLY, *Circuit Judge*, and BONSAL and M
LEY, *District Judges.*

FRIENDLY, *Circuit Judge*:

These two actions for injunctive and declaratory reli
invoking our jurisdiction, 28 U.S.C. § 1343(3), to enforce t
Civil Rights Act, 42 U.S.C. § 1983, challenge the cons
tutional validity of procedures for admission to the N
York bar, both generally and particularly as applied

the First and Second Judicial Departments.[1] The plaintiffs in 68 Civ. 2938 are three candidates certified as having passed their bar examinations, the Columbia Law Students Guild, and the New York City Chapter of the National Lawyers Guild. The plaintiffs in 68 Civ. 2917 are the Law Students Civil Rights Research Council, Inc., an organization of some 1,500 law students with chapters at sixty law schools including four in New York City, and three law students who plan to apply for admission to the New York bar when eligible. Both actions are sought to be maintained as class actions on behalf of all persons seeking or planning to seek such admission. The defendants are the Appellate Divisions and their Justices and the Committees on Character and Fitness for the First and Second Judicial Departments and their members.

Section 90(1) of the New York Judiciary Law, McKinney's Consol. Laws, c.30, provides

> Upon the state board of law examiners certifying that a person has passed the required examination, or that the examination has been dispensed with, the appellate division of the supreme court in the department to which such person shall have been certified by the state board of law examiners, if it shall be satisfied that such person possesses the character and general fitness requisite for an attorney and counsellor-at-law, shall admit him to practice as such attorney and counsellor-at-law in all the courts of this state, provided that he has in all respects complied with the rules of the court of

[1] The state of New York is divided by law into four judicial departments. N.Y. Const. Art. 6, § 4; Judiciary Law § 70. The First Department embraces the counties of New York and Bronx; the Second, the counties of Richmond, Kings, Westchester, Putnam, Dutchess, Orange, Rockland, Nassau, Suffolk, and Queens. Judiciary Law §§ 70, 140.

> appeals and the rules of the appellate divisions relating to the admission of attorneys.

This provision is implemented by Article 94 of the Civil Practice Law and Rules enacted in 1962, which adopts rules previously promulgated by the Justices of the Appellate Divisions. The rules [2] comprising Article 94 direct the appellate division in each judicial department to appoint a committee to investigate the character and fitness of each applicant for admission, R. 9401; prescribe that "unless otherwise ordered by the appellate division, no person shall be admitted to practice without a certificate from the proper committee that it has carefully investigated the character and fitness of the applicant and that, in such respects, he is entitled to admission," R. 9404; and authorize such committee, "subject to the approval of the justices of the appellate division, * * * to prescribe and from time to time to amend a form of statement or questionnaire on which the applicant shall set forth all the information and data required by the committee and the appellate division justices, including specifically his present and such past places of actual residence as may be required * * *", R. 9404. Rule 9406 directs:

> No person shall receive said certificate from any committee and no person shall be admitted to practice as an attorney and counselor at law in the courts of this state, unless he shall furnish satisfactory proof to the effect:
>
> 1. that he believes in the form of the government of the United States and is loyal to such government * * *

The complaints attack a number of these provisions as violating the First Amendment to the Constitution

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[2] Provisions of the Civil Practice Law and Rules which are denominated as Rules may be changed by the judicial conference of the state. See CPLR § 102 and Judiciary Law § 229.

as made applicable to New York by the Fourteenth. The statutory provisions, notably § 90(1) (a) of the Judiciary Law and the quoted portion of Rule 9406, are challenged as being so vague and impermissibly broad as to have a "chilling effect," see Dombrowski v. Pfister, 380 U.S. 479, 494, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965), on plaintiffs' exercise of their First Amendment rights. Rule 9406 is challenged as allowing investigation into mere beliefs and denial of admission for them and as placing on applicants a burden of proof they cannot constitutionally be made to bear. The questionnaires prescribed by the two committees are criticized as requiring disclosure of acts and associations beyond the scope of proper inquiry. Believing that substantial constitutional issues had been tendered, Judge Motley requested the Chief Judge of the Circuit to invoke a court of three judges, 28 U.S.C. §§ 2281, 2284, and this was done. Judge Motley reserved judgment on the motion made by plaintiffs in 68 Civ. 2917 to consolidate the two suits pursuant to Fed.R.Civ.P.42(a); we grant the motion and have considered the cases together. Plaintiffs have sought summary judgment or, if that not be granted, a preliminary injunction and discovery. The defendants have moved for dismissal of the complaint or, in the alternative, or dismissal so far as the complaint relates to the statutes [3] and remission of the issues concerning the questionnaires to Judge Motley.

I.

Before proceeding to the merits we must examine claims made with respect to the standing of the plaintiffs, the suability of the defendants, the failure to join the Court of Appeals or its members, and the desirability of abstention.

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[3] We shall use that term as embracing the Rules, see note 2.

With respect to the individual plaintiffs, defendants admit the standing only of the three who have passed the bar examination. They contend, however, that, so far as concerns the statutes, these three have no need for equitable relief since, if the character committee should refuse them certification on an impermissible ground, they can obtain an adequate remedy by applying to the appellate division and, if the state courts persist in refusal, by seeking review in the Supreme Court; and that, so far as concerns the questionnaires, their objections are at most a matter for a single judge since each questionnaire is effective only in part of the state. We find it unnecessary to evaluate this argument.[4] For we believe the three plaintiffs who are law students intending to apply for admission have standing to seek equitable relief since they have set themselves apart from the public at large sufficiently to have standing to protest statutes governing admission to the bar that may inhibit exercise of First Amendment rights during the period of their study. Cf. Gart v. Cole, 263 F.2d 244, 250 (2 Cir.), cert. denied, 359 U.S. 978, 79 S.Ct. 898, 3 L.Ed.2d 929 (1959); Gonzalez v. Freeman, 118 U.S.App.D.C. 180, 334 F.2d 570 (1964); Overseas Media Corp. v. McNamara,

[4] Defendants also argue that the plaintiffs who have passed the examination have, by presenting their certificates to the appellate division and obtaining questionnaires from the character committee, commenced "proceedings in a State court" within the anti-injunction statute, 28 U.S.C. § 2283, and that the grant of an injunction would violate that statute. Even if this were true, it would not prevent us from granting an injunction in favor of the law students. Further, we see no merit in the argument, quite apart from any question whether the Civil Rights Act creates an exception to § 2283. The purpose of the anti-injunction statute is to prevent a state court defendant from invoking the aid of a federal court to block an action instituted against him—not to prevent a state court applicant from seeking federal aid to eliminate what he considers an unconstitutional roadblock created by the state.

128 U.S.App.D.C. 48, 385 F.2d 308 (1967); Davis, Standing: Taxpayers and Others, 36 U.Chi.L.Rev. 601, 617-628 (1968). Since these students raise a substantial constitutional question with respect to at least one of the statutes, a court of three judges is required for that purpose; the argument that attack on the questionnaires should be remitted to a single district judge will be examined later in this opinion. We also have no occasion now to consider the standing of the various organizations that have joined in the complaints.

In considering whether an injunction or a declaratory judgment should be issued, we start from the principle of Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), that when officers administering a state statute act in a manner that exceeds constitutional limits, they have no claim to sovereign immunity. Against this is the equally well settled principle that a judge exercising his judicial function is not liable for damages under 42 U.S.C. § 1983. Pierson v. Ray, 386 U.S. 547, 553-555, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967).

While the interest served by the latter principle in making the state judge free "to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants," without "fear that unsatisfied litigants may hound him with litigation charging malice or corruption," Pierson v. Ray, supra, 386 U.S. at 554, 87 S.Ct. at 1218, is an important one, its applicability to an injunction is by no means clear. See United States v. McLeod, 385 F.2d 734, 738 (5 Cir. 1967) (Wisdom, J.). We fail to perceive what interest would be served by holding federal courts to be powerless to enjoin state officers from acting under a statute that allegedly deprives citizens of rights protected by the Civil Rights Act or promulgating regulations that are alleged to have that result simply because some of them are robed and others have been appointed by

those who are. Rather it would seem anomalous that while federal courts could entertain a complaint similar to the plaintiffs' if made with respect to other licensed professions, such as medicine or accountancy, they are powerless with respect to admission to the bar. The grant of injunctive relief in a case like this would not have the *in terrorem* effect on state judges that the threat of a subsequent damage action would have; rather, it would furnish a definitive ruling on a point of federal law for their future guidance, and, as shown above, fn. 4, would not infringe the policy expressed in the federal anti-injunction statute, 28 U.S.C. § 2283, proscribing injunctions that would stay "proceedings in a State court." The criteria set forth in Dombrowski v. Pfister, supra, for the grant of the extraordinary relief of injunction against the enforcement of a state statute are alleged to be present here. Plaintiffs do not challenge a state court's disposition of an individual case, but attack as "overly broad and vague regulations of expression," see 380 U.S. at 490, 85 S.Ct. at 1123, the rules and regulations promulgated and administered by the appellate divisions and their delegates. The alleged infringement of First Amendment rights of law students cannot be dissipated by the processing of particular individuals' applications for admission to the bar. These factors, which were "controlling on both the exercise of equitable power and the abstention issue" in Dombrowski, see Cameron v. Johnson, 381 U.S. 741, 755, 85 S.Ct. 1751, 14 L.Ed. 2d 715 (1965) (White, J., dissenting), make appropriate our consideration of equitable relief even though the defendants would be immune from liability in damages for their administration of the challenged procedures, see Saier v. State Bar of Michigan, 293 F.2d 756 (6 Cir.), cert. denied, 368 U.S. 947, 82 S.Ct. 388, 7 L.Ed.2d 343 (1961); Gately v. Sutton, 310 F.2d 107 (10 Cir. 1962); Clark v. Washington, 366 F.2d 678 (9 Cir. 1966) (judges and their delegates immune

for roles in disbarment proceedings). To hold otherwise would be to leave without a remedy a significant class of the deprivations of federal rights under color of state law, that Congress intended the federal courts to redress under 42 U.S.C. § 1983 and 28 U.S.C. § 1343.

We likewise see no force in defendants' argument that the suits should be dismissed, pursuant to Fed. R.Civ.P. 19, for failure to join the Court of Appeals or its members. While plaintiffs' attack on the "statutory scheme" governing admission to the bar takes in a Rule of the Court of Appeals, Rule VIII, the involvement of that rule does not necessitate joinder of its authors any more than an attack on the application of a statute requires joinder of the legislature. Moreover, the rule, adopted to implement Judiciary Law § 90, is attacked only for failing to furnish standards more precise than those found in § 90 and CPLR Article 94, and thus failing to rescue the procedure from the defects that allegedly inhere in the latter provisions. Section 90 and Article 94 have been enacted by the Legislature, and they place actual administration in the appellate divisions and their delegates, the committees on character and fitness, not in the Court of Appeals. There is no practical obstacle to adjudication of the constitutionality of this procedure in the absence of the Court or its members. Contrast Association For the Preservation of Freedom of Choice, Inc. v. Wadmond, 215 F. Supp. 648, 651-652 (S.D.N.Y.1963).

With respect to abstention, defendants have not made clear what debatable issues of construction state proceedings could resolve. Their contention is rather that admission to the bar is so peculiarly a matter of state concern that its resolution should be left to the state courts, subject, of course, to review by the Supreme Court. But that Court has given short shrift to similar claims in matters, equally of state concern, such as education, McNeese v. Board of Education, 373 U.S. 668, 83 S.Ct. 1433, 10

L.Ed.2d 622 (1963), and state employees, Baggett v. Bullitt, 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964); Keyishian v. Board of Regents, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967).

We therefore proceed to the merits.

II.

We need not tarry long over the claim that the requirement of § 90(1) (a) of the Judiciary Law that entrance to the bar shall be allowed only to a person who "possesses the character and general fitness requisite for an attorney and counsellor-at-law" is impermissibly vague. We perceive no significant distinction between this and California's requirement of "good moral character," duplicated in many other states, which the Court said in Konigsberg v. State Bar of California, 366 U.S. 36, 40-44, 81 S.Ct. 997, 6 L.Ed.2d 105 (1961), could not "well be drawn in question." Indeed, New York's requirement is somewhat more definite in specifying that the character traits required are those directly related to suitability for the practice of law. Once it is granted that the state can constitutionally require something more of applicants for admission to the bar than absence of the kind of criminal record that would warrant expulsion, as *Konigsberg* must be taken to have decided, the state must perforce use language of some generality. Such words, like others familiar in our law, acquire content through years of administration, see, e.g., Re Peters, 221 App.Div. 607, 225 N.Y.S. 144, aff'd, 250 N.Y. 595, 166 N.E. 337, rearg. denied, 252 N.Y. 572, 170 N.E. 148 (1927) (admission denied because of disbarment in another state); Re Greenblatt, 253 App.Div. 391, 2 N.Y.S.2d 569 (1938) (admission denied because of misrepresentations to character committee about applicant's dismissal from college for misconduct); Application of Cassidy, 268 App.Div. 282, 51 N.Y.S.2d 202, aff'd on rehearing, 270 App.Div. 1046, 63 N.Y.S.2d 840, aff'd, 296 N.Y. 926, 73 N.E.2d 41 (1944)

(admission denied because applicant urged creation of armed units for forceful overthrow of government and made inconsistent statements indicating lack of veracity). See also Schware v. Board of Bar Examiners, 353 U.S. 232, 247, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957) (concurring opinion of Mr. Justice Frankfurter). Plaintiffs' affidavits and briefs are eloquently silent about instances where New York has unjustifiably denied admission for lack of "the character and general fitness requisite for an attorney and counsellor-at-law."

III.

Rule 9406 demands more discussion. Plaintiffs' initial criticism is procedural. They say the requirement that the applicant "shall furnish satisfactory proof" of belief in our form of government and loyalty to it unconstitutionally imposes a burden of proof in violation of Speiser v. Randall, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958). We think that case fairly distinguishable on two grounds: The statute condemned in *Speiser* applied to all veterans claiming property tax exemption, and the Court differentiated loyalty oaths required of "a limited class of persons in or aspiring to public positions by virtue of which they could, if evilly motivated, creates serious danger to the public safety." 357 U.S. at 527, 78 S.Ct. at 1343. Lawyers, who are officers of the courts, fit the latter rubric. In Konigsberg v. State Bar, *supra*, 366 U.S. at 54, 81S.Ct. 997, the Court noted this distinction. Rule 9406 is also sustainable on the other ground taken in *Konigsberg*, 366 U.S. at 55, 81 S.Ct. 997, namely, the lack of "unequivocal indication" that it imposes a true burden of proof as distinguished from a burden of coming forward with evidence. We see no reason why New York may not impose the latter with respect to a subject concerning which the applicant has detailed knowledge but the committees would be required to make extensive investigation.

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Plaintiffs' substantive attack is that Rule 9406 has the breadth branded as unconstitutional in such important recent cases as Baggett v. Bullitt, *supra*, 377 U.S. 360, 84 S.Ct. 1316; Elfbrandt v. Russell, 384 U.S. 11, 86S.Ct. 1238, 16 L.Ed.2d 321 (1966); and Keyishian v. Board of Regents, *supra*, 385 U.S. 589, 87 S.Ct. 675 (1967). When one examines the decisions, in contrast to culling phrases from them, they are plainly distinguishable. What the Court found defective in *Baggett* about the teachers' oath specified in the Washington laws of 1931[5] was the part exacting a promise that the affiant would "by precept and example promote respect for the flag and the institutions of the United States of America and the State of Washington, reverence for law and order and undivided allegiance to the government of the United States." The Court held that to require teachers to make so broad a promise provided no "ascertainable standard of conduct" and required "more than a State may command." 377 U.S. at 372, 84 S.Ct. at 1322. The defect in *Elfbrandt* was not the oath required of state employees, see 384 U.S. at 12, 86 S.Ct. at 1239, but the statute subjecting to prosecution for perjury and to discharge from public office anyone who during his "term of office or employment knowingly and willfully becomes or remains a member of the communist party of the United States or its successors or any of its subordinate organizations or any other organization having for one of its purposes the overthrow by force or violence of the government of the state of Arizona or any of its political subdivisions." This was condemned as including "those

[5] "I solemnly swear (or affirm) that I will support the constitution and laws of the United States of America and of the State of Washington, and will by precept and example promote respect for the flag and the institutions of the United States of America and the State of Washington, reverence for law and order and undivided allegiance to the government of the United States." 377 U.S. at 361-362, 84 S.Ct. at 1317.

who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities * * *," 384 U.S. at 17, 86 S.Ct. at 1241, a position foreshadowed by Scales v. United States, 367 U.S. 203, 81 S.Ct. 1469, 6L.Ed.2d 782 (1961). See also United States v. Robel, 389 U.S. 258, 88 S.Ct. 419, 19 L.Ed.2d 508 (1967); Haskett v. Washington, 294 F.Supp. 912 (D.D.C. 1968). Finally, what the Court struck down in *Keyishian* was a "complicated plan," 385 U.S. at 601, 87 S.Ct. 675, imposing a variety of ill defined restraints on teachers in New York's public schools and colleges.

Rule 9406 is not an oath; the oath required to be taken upon admission to the bar, Judiciary Law § 466, is the "constitutional oath" New York Constitution, Art. XIII, § 1, "that I will support the constitution of the United States, and the constitution of the State of New York, and that I will faithfully discharge the duties of the office of ——, according to the best of my ability." The constitutionality of this oath is established by Knight v. Board of Regents, 269 F.Supp. 339 (S.D.N.Y. 1967), aff'd per curiam 390 U.S. 36, 88 S.Ct. 816, 19 L.Ed.2d 812 (1968). Neither does Rule 9406 hang *in terrorem* over persons admitted to the bar, like the statutes condemned in *Elfbrandt* and *Keyishian*; it goes to belief at the time of admission only. The claim is rather that the alleged undue breadth of the Rule will have an unconstitutionally inhibiting effect on persons who contemplate seeking admission to the bar, notably law students, since they will fear lest becoming members in controversial organizations or engaging in protests will be taken to evidence lack of belief in the form of government of the United States or disloyalty to it.

If one assumes a proper implementation of Rule 9406, plaintiffs' apprehensions seem unwarranted. The Rule does not prescribe a formula to which the applicant must adhere but is rather a direction to the committees and the appellate divisions to guide them in performance of their

functions under the statutory scheme. It instructs these bodies, before forwarding an applicant to take the constitutional oath, to satisfy themselves through analysis of the factual data before them of his belief in and loyalty to the government he will swear to support. Defendants interpret this command as directing them "to test whether applicants for admission can truly subscribe to the 'constitutional oath of office' "; they read "the form of the government of the United States" to mean exactly what comes within the oath of support, and "loyalty to such government" to mean ability to take the oath in good faith. This construction of the statute by the very agencies charged with its administration is commended by reason. Since those who authored Rule 9406 were quite as aware as we are that the First Amendment lies at the very heart of our "form of government," we should not lightly suppose they had any idea that applicants should be refused admission to the bar for exercising their constitutionally guaranteed rights to freedom of speech, peaceable assembly and petition for redress of grievances. Since they were likewise entirely aware that the Constitution contains Article V, providing for amendment, we will similarly not suppose they intended admission to be refused to applicants who advocate amendment, even very radical amendment, by lawful means. Accepting defendants' construction, as we do, we could hold Rule 9406 to be invalid on its face only if the Constitution makes it impermissible to give any scrutiny to whether an applicant can honestly take a lawfully required oath.

We do not read Bond v. Floyd, 385 U.S. 116, 87 S.Ct. 339, 17 L.Ed.2d 235 (1966), as prohibiting all inquiry to that end. The Court there recognized that the state need not seat a legislator who "swears to an oath *pro forma* while declaring or manifesting his disagreement with or indifference to the oath." 385 U.S. at 132, 87 S.Ct. at 347. If the state may consider declarations or manifestations made con-

temporaneously with the taking of the oath, by the same token it may make a reasonable inquiry whether the oath taker is not in fact engaging in a solemn farce. The holding was rather that the information gathered by the special committee of the Georgia legislature had no sufficient tendency to negate Mr. Bond's position that he could conscientiously take the oath.

We therefore hold that Rule 9406 is not unconstitutional if implemented in accordance with its purpose. Before we proceed to plaintiffs' contentions concerning the questionnaires for its application prescribed by the Committees on Character and Fitness for the First and Second Departments, we must consider whether that subject is appropriate for adjudication by a court of three judges, 28 U.S.C. § 2281, or should be remitted to a single district judge.

IV.

The relevant statute, 28 U.S.C. § 2281, instructs, in "deceptively simple" terms, see Sardino v. Federal Reserve Bank of New York, 361 F.2d 106, 114 (2 Cir.), cert. denied, 385 U.S. 898, 87 S.Ct. 203, 17 L.Ed.2d 130 (1966):

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

The defendants apparently concede that a court of three judges would be required if the character committees of

all four judicial departments had prescribed the same questionnaire, or even if they had prescribed different ones but all were here attacked on similar grounds. The concession is well made since, apart from other possible bases for applicability of the statute, the attack would be upon "an order made by an administrative board or commission acting under [State] statutes," cf. Lathrop v. Donohue, 367 U.S. 820, 824-827, 81 S.Ct. 1826, 6 L.Ed.2d 1191 (1961) (court order integrating state bar a "statute" within 28 U.S.C. § 1257), and it has long been settled that the ineptness of the 1913 amendment, 37 Stat. 1013, which added the reference to administrative orders but neglected to alter correspondingly the words "upon the ground of the unconstitutionality of such statute" should be overlooked. Oklahoma Natural Gas Co. v. Russell, 261 U.S. 290, 292, 43 S.Ct. 353, 67 L.Ed. 659 (1923). But defendants contend that since the questionnaires under attack cover only two of the four departments, the case comes within the judge-made exception to § 2281 excluding controversies not of statewide importance. See Ex parte Collins, 277 U.S. 565, 567-569, 48 S.Ct. 585, 72 L.Ed. 990 (1928); Ex parte Public Nat'l Bank, 278 U.S. 101, 49 S.Ct. 43, 73 L.Ed. 202 (1928); Wilentz v. Sovereign Camp, 306 U.S. 573, 59 S.Ct. 709, 83 L.Ed. 994 (1939); Rorick v. Board of Com'rs, 307 U.S. 208, 59 S.Ct. 808, 83 L.Ed. 1242 (1939); Moody v. Flowers, 387 U.S. 97, 87 S.Ct. 1544, 18 L.Ed.2d 643 (1967); Hatfield v. Bailleaux, 290 F.2d 632 (9 Cir. 1961); D. Currie, The Three-Judge District Court in Constitutional Litigation, 32 U.Chi.L.Rev. 1, 31-34, 55 (1964); D. Currie, Federal Courts 535-37 (1968).

We disagree for several reasons, any one of which would suffice:

The first ground lies in the difference between an attack on the order of an administrator as such and on the statute as applied by him. The distinction admittedly is elusive since, on the one hand, as said in Phillips v. United States,

312 U.S. 246, 252, 61 S.Ct. 480, 484, 85 L.Ed. 800 (1941), "some constitutional or statutory provision is the ultimate source of all actions by state officials," and, on the other, no statute is self-enforcing. Whatever the difficulties of articulation, there is still a perceptible difference between a challenge to a governor's "single, unique exercise" of power, 312 U.S. at 253, 61 S.Ct. at 484, under a statute of unquestioned validity empowering him generally to call out the national guard in case of war or "any forcible obstructing of the execution of the laws or reasonable apprehension thereof, and at all other times he may deem necessary," and the continuing administrative implementation of a statute, itself under attack, which is constitutional if applied in one way and not if in another. To put the point in a slightly different way, if the administrator is interpreting legislative policy, even a local application requires three judges; if he is making policy under a delegation, his local action can be tested by a single judge. See for further discussion Sardino v. Federal Reserve Bank, *supra,* 361 F.2d at 115; D. Currie, *supra,* 32 U.Chi.L.Rev. at 37-55; D. Currie, Federal Courts 534-35 (1968).

The second ground is that the actions of the two character committees under authority of the appellate divisions are not truly "local" within the teaching of the cases we have cited. It is true that the regulations of the committee in each department bear directly only on applicants who, being residents there, are seeking admission through the process established for them. But the effect of admission or denial is state-wide; admission in one department is the key to lawful practice throughout the State.

Thirdly, even if the questionnaires should properly be regarded as local administrative action, we would nevertheless retain jurisdiction as a three-judge court. The Supreme Court, in Louisville & N. R. R. v. Garrett, 231 U.S. 298, 303-304, 34 S.Ct. 48, 58 L.Ed. 229 (1913), expressly upheld the jurisdiction of the three-judge panel over nonconstitutional questions affecting the validity of the orders

also attacked on constitutional grounds. In Florida Lime & Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73, 80-81, 80 S.Ct. 568, 4 L.Ed.2d 568 (1960), the Court restated the *Garrett* holding in an approving dictum, while deciding that the joinder of a nonconstitutional claim did not obviate the need for three judges on the constitutional one itself. Although both *Garrett* and *Lime Growers* concerned nonconstitutional attacks upon the same statute or order whose constitutional challenge required three judges, the same reasoning should apply when one attack is on the statute and the other on an order issued thereunder. In either case the overlap of evidence and argument is likely to be considerable. The policy of efficient use of judicial effort was pushed much further than this in United Mine Workers of America v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130, 16L.Ed.2d 218 (1966), where there was an encroachment upon state interests in determining issues not independently within federal cognizance. Since some issues raised by the complaints plainly call for three judges, there is not the compelling argument for judicial economy that exists when dissolution of the panel at the outset would save the energies of the two judges relieved from further duty. Furthermore to consign the questionnaires to a single judge would entail the prospect of separate appeals, one to the Supreme Court and the other to the Court of Appeals.

In Zemel v. Rusk, 381 U.S. 1, 85 S.Ct. 1271, 14 L.Ed.2d 179 (1965), the Supreme Court entertained an appeal from three judges in a case we cannot distinguish from our own. The calling of three judges were there upheld because the plaintiff attacked the passport statute on the ground of unconstitutional delegation; the court below and the Supreme Court both considered, in addition, the contention that the Secretary of State's regulations under that statute were invalid. Perceiving the situation before it as no different from where the additional claim is a nonconstitutional at-

tack on the same statute, the Supreme Court quoted from *Lime Growers* to establish that joining claims not themselves within the three-judge statutes does not dispense with the need for three judges for the consideration of all. See also Kurland, The Romero Case and Some Problems of Federal Jurisdiction, 73 Harv.L.Rev. 817, 838-45 (1960).

Finally, even if all the foregoing grounds should be wrong, and of course we do not think they are, we would nevertheless, in the exercise of discretion, continue to act together as regards the questionnaires. "Although a single district judge is without power to act in a case requiring three judges, the opposite is not true." Swift & Co. v. Wickham, 230 F.Supp. 398, 410 (S.D.N.Y. 1964), appeal dismissed for want of jurisdiction, 382 U.S. 111, 86 S.Ct. 258, 15 L.Ed.2d 194 (1965), aff'd, 364 F.2d 241 (2 Cir. 1966), cert. denied, 385 U.S. 1036, 87 S.Ct. 776, 17 L.Ed.2d 683 (1967). When the three-judge court has heard the entire case and lack of jurisdiction over one issue is at best debatable, sound policy calls for the three judges to decide that also, since a return of the issue to a single judge "would result in an invalid order if the return was erroneous, whereas the only consequence of erroneous retention of jurisdiction by the three-judge court is that the appeal should be taken to the Court of Appeals rather than to the Supreme Court, an uncertainty against which the plaintiffs may protect themselves by timely appeals to both courts." *Id.*

V.

The questionnaires in use in the two departments have been the subject of recent changes which demonstrate that the Committees on Character and Fitness and the Justices of the Appellate Divisions are well aware of the need to bring them in line with developing concepts of First Amendment rights. The complaint in 68 Civ. 2938 attacked ques-

tionnaires issued to plaintiffs Wexler and Kaimowitz early in 1968 but these had been altered by the two departments in May before the actions were brought. After the commencement of the actions the appellate divisions deleted questions, set forth in the margin,[6] which would have raised exceedingly serious problems under Shelton v. Tucker, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960). See also Schneider v. Smith, 390 U.S. 17, 88 S.Ct. 682, 19 L.Ed.2d 799 (1968).

The questions to which most strenuous objection is made are the following:

> 26. Have you ever organized or helped to organize or become a member of or participated in any way whatsoever in the activities of any organization or group of persons which teaches (or taught) or advocates (or advocated) that the Government of the United States or any State or any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means? ———— If your answer is in the affirmative, state the facts below.
>
> 27(a) Do you believe in the principles underlying the form of government of the United States of America?
> ————

[6] "28(a) Have you participated in activities of a public or patriotic nature or in philanthropic, religious, or social service? ———— If so, state fully.

"(b) If you engaged in extracurricular activities (athletic, dramatic, debating, club, committee, administration, etc.) in college, indicate approximate amount of time spent and responsibility involved.

"29(a) Give the names, addresses, objects and period of membership in each and every club, association, society or organization of which you are or have been a member other than those associated with and recognized by accredited schools and colleges."

(b) Can you conscientiously, and do you, affirm that you are, without any mental reservation, loyal to and ready to support the Constitution of the United States? ————

Taking these in reverse order, we fail to see what valid objection can be made to question 27(b). This differs from the New York Constitutional oath sustained in Knight v. Board of Regents, *supra*, 269 F.Supp. 339, aff'd, 390 U.S. 36, 88 S.Ct. 816, 19 L.Ed.2d 812, only in the inclusion of two additional phrases, "without any mental reservation" and a declaration of loyalty. The former phrase is included in the oaths all of us have taken as judges, and we cannot perceive any proper reason why any applicant for admission to the bar should cavil over it. We likewise find it impossible to see why requiring a future lawyer to declare his loyalty to the Constitution should be deemed objectionable when a promise to support it is not.[7] The suggestion that a prospective lawyer would fear that a declaration of loyalty to the Constitution would prevent his criticizing acts of the Government does not require discussion.

Question 27(a) is alleged to be impermissibly vague. It is claimed, for example, that an applicant might think he could not respond in the affirmative if he did not believe in the electoral college or a bicameral legislature. There is enough substance to this objection that we think the question should be eliminated or altered. The phrase "principles underlying the form of government," as distinguished from the simpler phrase used by Rule 9406 in addressing the appellate divisions and the committees, might be understood by an applicant to include many "principles" of a lower order than the essentials, democratic government and change by lawful methods. One who favored drastic reforms, albeit through constitutional means, might perhaps

[7] See also the oath which the Constitution requires of the President to "preserve, protect and defend" it. Art. II, § 1.

feel unable conscientiously to answer with a simple "yes"; yet the format of the question affords no additional space for explanation and the word "principles" is so vague as to create a problem even if opportunity for explanation were afforded. The question thus may share the defect of the oath in Whitehill v. Elkins, 389 U.S. 54, 88 S.Ct. 184, 19 L.Ed.2d 228 (1967), which the Supreme Court found capable of being read to require the affiant to disclaim any desire to "alter" the government by peaceful "revolution." It seems unnecessary to require such an imprecise declaration from an applicant for admission to the bar. Defendants say the question is intended merely to be "subsidiary to and supportive of" the constitutional oath; while we have held that the state can permissibly make some inquiry into the applicant's ability sincerely to take the oath, this purpose can be served by more circumscribed questions, such as 27(b) and the various factual questions contained throughout the questionnaires. Question 27(a) should thus be deleted or rephrased to remove the imprecision we have noted.

Question 26 also raises a difficult problem. Plaintiffs rely on cases such as *Baggett, Elfbrandt,* and *Keyishian,* cited in section III of this opinion, and also on Shelton v. Tucker, *supra,* 364 U.S. 479, 81 S.Ct. 247, and Schneider v. Smith, *supra,* 390 U.S. 17, 88 S.Ct. 682. Defendants distinguish the former as involving statutes that set up a bar to employment or decreed a termination of it, all in the field of teaching where the First Amendment dictates "particular concern for the safeguarding of academic freedom," Haskett v. Washington, *supra,* as contrasted to the mere inquiry here. They distinguish *Shelton* and *Schneider* upon the breadth of the questions asked. Defendants assert in the first instance that the principle remains sound that in order to protect "some interest clearly within the sphere of governmental concern" a state may "deny positions to persons supposed to be dangerous because the position might be used to the

detriment of the public." Speiser v. Randall, *supra,* 357 U.S. at 527, 78 S.Ct. at 1343. In Gerende v. Board of Supervisors, 341 U.S. 56, 71 S.Ct. 565, 95 L.Ed. 745 (1961), for example, the Court sustained a requirement that a candidate for public office swear that he was not engaged " 'in one way or another in the attempt to overthrow the government *by force or violence,*' and that he is not knowingly a member of an organization engaged in such an attempt." Further, although what is within the state's power of exclusion is necessarily within its power of inquiry, defendants argue that the latter is broader since the state is entitled to information from which it may develop that a person has in fact engaged in conduct justifying a bar to office that he has not been willing to admit. With respect to the scope of inquiry, Question 26 does not approach the requirement struck down in *Shelton* that every associational tie be disclosed, a requirement the Court held to be too indiscriminate in its sweep. The decisions in Beilan v. Board of Public Education, 357 U.S. 399, 78 S.Ct. 1317, 2 L.Ed.2d 1444 (1958); Lerner v. Casey, 357 U.S. 468, 78 S.Ct. 1311, 2 L.Ed.2d 1423 (1958); Nelson v. County of Los Angeles, 362 U.S. 1, 80 S.Ct. 527, 4 L.Ed.2d 494 (1960); Konigsberg v. State Bar of California, *supra,* 366 U.S. 36, 81 S.Ct. 997, 6 L.Ed.2d 105 and In re Anastaplo, 366 U.S. 82, 81 S.Ct. 978, 6 L.Ed.2d 135 (1961), demonstrate that the Constitution does not prohibit a state from *asking* a public official or a candidate for admission to the bar whether he was ever a member of the Communist Party or, as in the *Nelson* case, of other organizations known to the member to advocate violent overthrow of the government.

The most obvious problems with Question 26 are the parenthetical past-tense verbs. While the draftsman probably intended these to relate to the period of the applicant's membership, this is not made clear; the question could be read as requiring an applicant to report membership in an

organization that advocated overthrow of the Government of the United States in 1860 but now would defend every syllable of the Constitution. The question should be corrected to clarify that the organization's teaching or advocacy of violent overthrow must have coincided in time with applicant's membership—a correction to which we cannot conceive the defendants would object. The next issue is whether the question must be further limited to cases where the applicant knew of the teaching or advocacy. Defendants do not assert they could constitutionally exclude applicants unless this was shown; their contention is rather, as noted above, that they should be permitted to frame their inquiry more broadly, that an applicant making an affirmative answer will be free to qualify this, and that the committees and the appellate divisions will then be in a position to determine the truth of the disclaimers. While there is force in this, no Supreme Court decision has gone beyond sustaining inquiry into membership in organizations known to the member to advocate forceful or violent overthrow, or in the Communist Party whose advocacy is evidently deemed a matter of common knowledge. We are not disposed to sanction inquiries of greater scope. Although Sweezy v. New Hampshire, 354 U.S. 234, 77 S.Ct. 1203, 1 L.Ed.2d 1311 (1957), could be distinguished as involving a sweeping legislative inquiry not limited to public employees or applicants for admission to the bar, it indicates the Court's aversion to questions concerning associations in the absence of *scienter*. The prospect of having to respond to an inquiry like Question 26 might have a deterring effect on exercise of the constitutionally protected right of association, and this can be justified only when "the subordinating interest of the State" is "compelling," Sweezy v. New Hampshire, *supra*, 354 U.S. at 265, 77 S.Ct. at 1219 (concurring opinion of Frankfurter, J.)—a test applied in Bates v. Little Rock, 361 U.S. 516, 524, 80 S.Ct. 412, 4 L.Ed.2d 480 (1960) and NAACP v. Button, 371 U.S. 415, 439, 83 S.Ct. 328, 9 L.Ed.2d

405 (1963). The state's interest in informing itself of the prior associations of candidates for the bar with subversive organizations can be adequately protected by a question more narrowly phrased. See Nelson v. County of Los Angeles, *supra*, 362 U.S. at 2-3 & n. 1, 80 S.Ct. 527.

Plaintiffs also attack Question 31. In the First Department this reads:

> Is there any incident in your life not called for by the foregoing questions which has any favorable or detrimental bearing on your character or fitness? —— ——— If your answer is "Yes" state the facts.

In the Second Department the words "favorable or" are omitted. Plaintiffs contend that this catch-all has a serious *in terrorem* effect, especially in light of the directions at the head of the application:

> 1. This is a statement made under oath. Applicant's failure fully and accurately to disclose any fact or information called for by any question may result in the denial of the application for admission, or if applicant shall have been admitted before the discovery thereof, in the revocation of his license to practice law.

We agree. The committees and the appellate divisions should be able to frame specific questions adequate to elicit the information they need; indeed they have demonstrated in the 31 other questions what plaintiffs consider an excessive ability in that regard. We find no interest of the state sufficiently compelling to require an applicant to engage in the soul-searching of his entire past life demanded by Question 31.[8]

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[8] At the argument before us, David W. Peck, Esq., former Presiding Justice of the Appellate Division for the First Department, who appeared as counsel for the character committees, while contending Question 31 to be innocuous, expressed personal dislike for it and the opinion that there would not "be any great to-do about question 31."

We take a different view with respect to the last question requiring discussion in the text of this opinion:

> 32. (a) Have you read the Canons of Ethics adpoted by the American and New York State Bar Associations? ————
>
> (b) Will you conscientiously endeavor to conform your professional conduct to them? ————

The objection is to (b); plaintiffs contend that an applicant may conscientiously disagree with various Canons, which currently are being revised, and still deserve admission to the bar. We agree with that position but not with the conclusion plaintiffs draw from it. There is no vagueness here of the sort we found in Question 27(a); an applicant who has read the Canons knows just what standards he is being asked about. If he dissents from a particular Canon, he need only say so and explain why. We have been cited no evidence that such dissent on a reasoned basis would bar admission.

Finally, plaintiffs attack generally the practice of the committees of conducting individual personal interviews with applicants, at which, among other things, questions are posed "on the basis of the applicant's answers to the questionnaire." Plaintiffs allege that the scope of this questioning is sometimes so broad as to constitute an unwarranted invasion into the applicant's personal and political privacy. We do not understand plaintiffs to deny that a personal interview can be a permissible and very helpful aid to the committees in judging fitness for admission to the bar. Rather, their complaint goes to the scope of interviews conducted at a time when the questionnaires included inquiries since deleted or here disapproved by us. We have no reason to assume that as the scope of the committees' written in-

uiry is contracted, there will not be a similar adjustment n the focus of their spoken questions.[9]

VI.

We must now consider the appropriate disposition in light f the foregoing discussion. While we have power to issue n injunction against use of the questionnaires until Ques- ions 26, 27(a) and 31 are omitted or rephrased and against esumption of use of the questions that have been discon- inued, see, e.g., fn. 6, we find no immediate occasion for

[9] Plaintiffs also challenge Questions 19-22, which call for informa- ion concerning the applicant's registration for Selective Service, re- ection for and discharge from military service, and charges or com- plaints during military service. We do not understand plaintiffs to leny that all these are matters of public record, which, however, the committees could obtain only at great trouble and expense. It is not unreasonable for them to save this expense by drawing upon the ap- plicant's personal knowledge. In reply briefs plaintiffs complain of a requirement, allegedly made by the Committee on Character and Fitness of the Second Department, that an applicant authorize the Clerk of his Local Board to allow members and staff of the Com- mittee and the Appellate Division to have unrestricted access to his entire file. Although we would entertain considerable doubt about the propriety of this, we have not passed upon it since it was not al- leged in the complaints or affidavits.

The complaints do raise question about the committees' require- ment that applicants obtain and submit affidavits from third persons attesting to their good moral character. The forms of these affidavits have recently undergone radical curtailment. The First Department's current form says nothing about home visits by the affiant, and the Second Department's does not require the affiant to aver that he has visited the applicant's home but merely to say whether or not he has. While the latter provision is asserted to be an invasion of the appli- cant's personal privacy forbidden by Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), and Camaro v. Municipal Court, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967), those cases are so remote from the issue as not to warrant discussion.

doing so. Although "the court's power to grant injunctive relief survives discontinuance of the illegal conduct," United States v. W. T. Grant Co., 345 U.S. 629, 633, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953), a court is not required to award it, as that case demonstrates. Counsel for the character committees emphasized at the argument that "these State Courts are not stiff-necked about this thing." Considerations of comity to respected fellow-judges suggest they should be afforded a reasonable opportunity to reflect on our conclusions and perhaps take action that may obviate any occasion for an injunction. Law students will not suffer any serious chill during this brief interval, when the ultimate result is so clear. We believe also that if the three plaintiffs who have passed the examinations and have refused to fill out the questionnaires should decline to answer Questions 27(a) and 31 and answer Question 26 only as limited to membership in organizations known to them to be then teaching or advocating overthrow of the Government by force or violence, they would not find obstacles in their way; if our expectation should prove unfounded, they may apply to us for relief.

We shall therefore hold all motions until such date, not later than ninety days from the entry of this opinion, when counsel for the defendants shall report in writing what action, if any, the appellate divisions have taken. Such report shall be served upon plaintiffs' counsel; within twenty days thereafter, they may, if so advised, serve and file appropriate papers with respect to what further relief, if any, they deem required; the defendants shall answer within fifteen days. If counsel desire an opportunity for further argument, we will assign a date.

It is so ordered.

MOTLEY, District Judge (concurring in part, dissenting in part.)

In these consolidated cases plaintiffs challenge, on First and Fourteenth Amendment grounds, certain New York

statutes which contain the criteria for determining eligibility for admission to the bar.[1] One of these statutes provides that an applicant shall be admitted if the admitting court is satisfied that he "possesses the character and general fitness requisite for an attorney and counselor-at-law." New York Judiciary Law, § 90. The second statute provides that the applicant shall be admitted if, in addition, he has "furnished satisfactory proof to the effect that he believes in the form of government of the United States and is loyal to such government." New York Civil Practice Law and Rules, Rule 9406. These statutes are attacked on the ground that they are unconstitutionally vague and broad, resulting in a chilling effect upon the exercise of First Amendment freedoms by law students and those awaiting admission to the bar after having passed the written examination required. This judge, applying the concepts of vagueness and broadness holds: 1) the first statute is constitutional, but its interpretation, implementation and application by the defendant courts and their respective character committees is unconstitutional; and 2) the second statute is unconstitutional on its face and as interpreted, implemented and applied by defendants.

There is a rule of the New York Court of Appeals which implements the first statute by providing that every applicant must produce before the character committee and file with it "evidence that he possesses the *good moral character* and general fitness requisite for" an attorney.[2] [Emphasis Added.] This must be shown by the affidavits of two

[1] The New York statutory and regulatory provisions and procedures governing admission to the bar are similar to those in most other states. See generally Schware v. Board of Bar Examiners, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957) and Konigsberg v. State Bar of California, 353 U.S. 252, 77 S.Ct. 722, 1 L.Ed.2d 810 (1957).

[2] New York Judiciary Law, Appendix, Rule VIII-1, Rules of the New York Court of Appeals for Admission of Attorneys.

reputable persons residing in the city or county in which the applicant resides, one of whom must be a practising attorney.[3] According to the rule, the affidavits "must state that the applicant is, to the knowledge of the affiant, a person of *good moral character* and must set forth in detail the facts upon which such knowledge is based."[4] [Emphasis Added]. The term "good moral character" is not defined. The rule further provides that such "affidavits *shall not be conclusive,* and the [admitting court] may make further examination and inquiry through its Committee on Character and Fitness or otherwise."[5] [Emphasis Added]. Finally, the rule provides that the admitting courts, which are the four appellate divisions of the New York Supreme Court, shall adopt such additional rules as they may deem fit with respect to the requirement that the applicant prove his good moral character and general fitness.[6]

I. *Statement of the Facts*

In order to recognize the full dimensions of the constitutional issues posed here, it is necessary to examine closely the manner in which the foregoing statutes and rules were interpreted, implemented and applied by the appellate divisions which are defendants here and their respective character committees. To implement the Court of Appeals rule, defendants prepared instructions for persons furnishing affidavits and the affidavit forms, copies of which are

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[3] *Id.*

[4] *Id.* Rule VIII-2.

[5] *Id.*

[6] *Id.* Rule VIII-4. This rule reads:

"The justices of the Appellate Division in each department shall adopt for their respective departments such additional rules for ascertaining the moral and general fitness of applicants as to such justices may seem proper."

attached to the original and amended complaints in the second action. The First Department's instructions advised affiants that their affidavits must "state that to the knowledge (or in the opinion) of the affiant the applicant is a person of good moral character", and must set forth "in detail the facts upon which affiant's knowledge of or opinion as to applicant's moral character is based." There is no definition of "good moral character" and the language of the statute, "character and general fitness requisite for an attorney and counsellor-at-law", is not used. The instructions additionally advised: "Affidavits covering home life should characterize family and home environment." There is no further amplification of this instruction. The Second Department combined its instructions with the affidavit form and entitled it: "Form for Affidavit of Character and Home Life." The affidavit form contained a series of questions to be answered by the affiants. These questions demonstrate the unconstitutionally vague and broad manner in which the first statute, Judiciary Law § 90, and the Court of Appeals Rule VIII was interpreted, implemented and applied by defendants. The exemplars are as follows:

> 7. Describe briefly your associations with the applicant, setting forth how such associations began, and indicate in what activities (business, scholastic, cultural, recreational, athletic, social or otherwise) you have participated with applicant. It is not a sufficient answer merely to repeat the above words in parentheses, but the *particular activities* should be specified.
>
> 9. What is your conclusion as to applicant's *moral* character? (Reserve details for next question)
>
> 10. Set forth in detail what you have *personally observed* in your associations with applicant which

leads you to the onclusion set forth under question 9, specifying, among other things, the moral qualities and perscal traits observed in applicant's conduct, and his sual attitude toward those with whom he associate.

11. Have you isited applicant's

(a) parental hcne;

(b) marital hoie, if any;

(c) any other bme or place of abode applicant may have had

(answer "Yes"or "No" to each subdivision).

12. (a) How oten, approximately, during each week, month or yer, have you visited the parental, marital or other hoie or place of abode of applicant?

("Frequently"or "often" or other indefinite statement is not asatisfactory answer. Note that in most cases visis will be less frequent than the contacts mentionedin Q. 8, above).

(b) During wht years (stating approximate dates)?

(c) At what adcresses (listing them specifically)?

(d) Do such viits still continue? If not, when did they cease, andfor what reason?

13. Have you a such visits met and conversed with:

(a) Applicant;

(b) The membes of his family or household? If not with all, with hich members?

14. (a) With hat persons has the applicant lived during each priod of your association with him in his home?

(If during period or periods covered by answer, applicant has lived with family, enumerate the members of the family during each period. If, during any period of association, he has lived apart from his family, enumerate the persons, if any, with whom he has lived during each such period.)

(b) With what persons does he live at the present time, if that be known to you?

15. Set forth in detail what you have *personally observed* as to the moral qualities and conduct of the members of applicant's family or other persons with whom he has lived:

(a) in parental home;

(b) in marital home, if any;

(c) in any other home or place of abode applicant may have had.

16. What do you say of applicant's conduct towards the members of his family or household during each period of your association with him in his home, and at present, if association still continues? (Give full details).

17. State fully any other facts within your knowledge, *or of which you have information*, which in your opinion have any bearing on the applicant's moral character or fitness to practise law, or which would be helpful to the Committee in determining the applicant's character and fitness. [Emphasis Added].

After these actions were filed, these affidavit forms and the instructions were changed. The First Department's form was greatly shortened and has omitted the instructions

regarding affidavits covering home life but asks the affiant to state:

> "6. Length and nature of affiant's acquaintance with applicant:
>
> (a) Residence of applicant;
>
> (b) Persons with whom applicant lives (if known to affiant).
>
> 7. Affiant's conclusions as to applicant's moral character:
>
> 8. Facts upon which affiant's knowledge or opinion as to applicant's moral character is based.

Again, the term "moral character" is not defined and the statutory language is not incorporated.

The Second Department has changed the title of its form to read: "Form for Affidavit of Character and Residence." It has omitted some of the above questions but still requests the following information:

> "5. Describe briefly your associations with the applicant, setting forth how such associations began, and indicate in what activities (business, scholastic, cultural, recreational, athletic, social or otherwise) you have participated with applicant. It is not a sufficient answer merely to repeat the above words in parentheses, but the particular activities should be specified.
>
> 7. What is your conclusion as to applicant's moral character? (Reserve details for next question).
>
> 8. State in detail the facts upon which your knowledge or opinion as to applicant's character is based.

9. Have you visited applicant's

(a) parental home;

(b) marital home, if any;

(c) any other home or place of abode applicant may have had?

10. How often have you visited the parental, marital or other home or place of abode of applicant?

("Frequently" or "often" or other indefinite statement is not a satisfactory answer. Note that in most cases visits will be less frequent than the contacts mentioned in Q. 6, above.)

Missing from this form, again, is any definition of the terms "moral character" and the statutory language is not referred to therein.

In addition to the character affidavits, each judicial department, as authorized, has appointed a committee for the purpose of making an investigation.[7] Each committee is known as the Committee on Character and Fitness of the particular department. To enable the committee to make its investigation, another statute authorizes the committee, subject to the approval of the justices of the appellate division, "to prescribe and from time to time amend a form of statement or questionnaire on which the applicant shall set forth all the information and data required by the Committee and the appellate division justices."[8] Two other statutes must be noted at this juncture. One provides that, "[u]nless otherwise ordered by the appellate division, no person shall be admitted to practice without a certificate from the proper committee that it has carefully investigated the character and fitness of the applicant and that, in such respects, he is

[7] New York Civil Practice Law and Rules, Rule 9401.

[8] *Id.* Rule 9404.

entitled to admission."[9] The other statute is the second statute referred to initially which provides that, "[n]o person shall receive said certificate from any committee and no person shall be admitted to practice as an attorney * * *, unless he shall furnish satisfactory proof to the effect * * * that he believes in the form of the government of the United States and is loyal to such government."[10]

In accordance with the foregoing statutory mandates, defendants have prepared application forms. These forms, known as the "Questionnaire and Statement", presently contain 32 questions, all of which must be answered unless otherwise indicated. In addition, "every question and every part of each question must be answered, even though the answer be negative." The application form admonishes the applicant: "This is a statement made under oath." The applicant is further warned that, "failure fully and accurately to disclose any fact or information called for by any question may result in the denial of the application for admission, or if applicant shall have been admitted before the discovery thereof, in the revocation of his license to practice law."

There are two application forms involved in these actions; one form is that used by the Committee on Character and Fitness of the First Department and the other by the Second Department's Committee. When the complaints in these actions were filed, these forms, unknown to plaintiffs, had just been amended in May 1968. Some of the questions objected to in the original complaints had been either deleted or changed. In June 1968, just prior to the filing of these suits, the First Department had already begun to distribute its amended form. After these actions were filed, the Second Department began to distribute its

[9] *Id.*

[10] *Id.* Rule 9406.

mended form to applicants. After the filing of these com-laints, still other questions originally objected to were eleted from the amended forms.[11] The net effect of these hanges and deletions, however, is to leave unchanged the 'irst and Fourteenth Amendment challenge to the statutes. 'The substance of the statutory and regulatory complex emains and from the outset * * * [plaintiffs'] basic claim as been that they are aggrieved by its application." Keyi-hian v. Board of Regents of Unversity of State of New 'ork, 385 U.S. 589, 596, 87 S.Ct. 675, 680, 17 L.Ed.2d 629 1967). See also, Dombrowski v. Pfister, 380 U.S. 479, 85 .Ct. 1116, 14 L.Ed.2d 22 (1965).

In the original forms, questions 19, 20 and 21 of the 'irst Department's form and questions 32 and 36 of the ther were specifically objected to on First and Fourteenth mendment grounds. Once again, the full flavor of the con-titutional assault cannot be appreciated without a close crutiny of how the committees interpreted and set about heir task of implementing and applying the two basic stat-tes containing the criteria for admission to the bar. The ollowing questions attest the "danger of tolerating, in the rea of First Amendment freedoms, the existence of a * * * regulatory] statute [i. e. C.P.L.R. 9406] susceptible of weeping and improper application" NAACP v. Button, 71 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405 (1963); Dombrowski v. Pfister, supra.

First Department

19. (A) Are there any favorable or unfavorable incidents in your life, whether at school, college, law school, business or otherwise, not called for by the questions contained in this questionnaire or disclosed in your answers thereto?

[11] The first action was filed July 16, 1968 and the second action he next day.

If so, list them.

20. Have you participated in activities of a public or patriotic nature or in philanthropic, religious, or social services?

If so, state fully.

21. (A) Give the names, addresses, objects of and period of membership in each and every club, association, society or organization of which you are or have been a member.

Second Department

32. Have you written any articles for publication?

If so, give the circumstances, the name of publication, the date of publication and the title and subject matter of the article. (Include information relative to any articles for publication in any school or college paper or magazine.)

36. (A) Are you now, or have you ever been at any time (including the time during which you attended high school, college and law school, and including the time during which you engaged in military service or any community activity) a member of any club, association, society or organization or *political party?* [Emphasis Added].

(B) If answer be yes, give the name, address and objects of each and every such club, association, society or organization or party and state the period of your membership and your position or title therein.

Questions 22 and 23 of the First Department's form and question 35 of the other were also objected to by plaintiffs.

These questions read:

First Department

22. (A) Are you now or have you ever been a member of *or affiliated in any way* with any of the organizations or groups listed as subversive by the Attorney General of the United States? [Emphasis Added].

(B) Have you paid dues to, contributed in any way or signed a petition for any such organization or group?

If your answer is yes to either subdivision of this question, give the following information:

Name and address of organization or group * * *

When you became a member or affiliated with it * * *

Period of your association or connection with it * * *

How and why you became associated or connected with it * * *

How and why you severed your connection with it, if you did * * *

23. Have you ever participated *in any way whatsoever* in the activities of such organizations or groups? [Emphasis added].

If so, to what extent.

Second Department

35. (a) Are you pledged now or have you ever been pledged to aid in effecting changes in our form of government by force or violence or any other unlawful means?

(b) Are you now or have you ever been a member of any party or organization created for such pur-

pose or for the propagandizing or the furtherance thereof?

(c) If answer is yes, state the name of the party or organization.

(d) Are you now, or have you ever been, a member of the Communist Party, or have you ever been enrolled as a member of the Communist Party?

The oaths prescribed by question 24 of the First Department's form and questions 33 and 34 of the other were objected to also. The First Department's question, which was virtually identical with the Second Department's question read:

24. (A) Do you believe in the principles underlying the form of government of the United States? * * * State on a rider, in not less than 100 words, what you believe those principles to be. (Handwritten)

(B) Can you conscientiously and do you affirm that you are, without any mental reservation, loyal to the Government of the United States? * * *

The June 1968 amended forms deleted the following questions, *supra:* 19B, 20, 21(a) (First Department) and 32 and 36 (Second Department). The amended forms revised the remaining First Department questions as follows:

Question 19(A) was revised to read:

"31. Is there any incident in your life not called for by the foregoing questions which has any favorable or detrimental bearing on your character or fitness? If the answer is "Yes" state the facts.

No time limit is specified as to this question.

Question 21(B) was revised to read:

"29. (b) Have you ever been disciplined, expelled, suspended, or ordered to resign from any club, association, society or organization? If your answer is "Yes", state the facts.

Again, no time limitation is given.

Questions 22(A) and (B) and 23 were revised to read:

"26. Have you ever organized or helped to organize or become a member of *or participated in any way whatsoever* in the activities of any organization or group of persons which teaches (or taught) or advocates (or advocated) that the Government of the United States or any State or any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means?

If your answer is in the affirmative, state the facts below. [Emphasis Added].

Questions 24(A) and (B) were revised to read:

"27. (a) Do you believe in the principles underlying the form of government of the United States of America?

(b) Can you conscientiously, and do you, affirm that you are, without any mental reservation, loyal to *and ready to support the Constitution of the United States?* [Emphasis Added].

The amended forms revised the remaining Second Department questions as follows: Questions 33 and 34 (principles underlying form of government and loyalty) were revised to read as the First Department's question 27, immediately *supra,* and questions 35 (pledged to aid change in form of government) was revised to read as the First

Department's question 26, *supra,* immediately preceding question 27.

After the suits were commenced and after the June 1968 amended forms had been distributed, in a tacit confession of error, defendants advised the court that the following questions had been deleted from both amended forms:

> 28. (a) Have you participated in activities of a public or patriotic nature or in philanthropic, religious, or social services?
>
> If so, state fully.
>
> (b) If you engaged in extracurricular activities (athletic, dramatic, debating, club, committee, administration, etc.) in college indicate approximate amount of time spent and responsibility involved.
>
> 29. (a) Give the names, addresses, objects of and period of membership in each and every club, association, society or organization of which you are or have been a member other than those associated with and recognized by accredited schools and colleges.

In addition to the affidavits of good moral character and complete answers to questions in the Questionnaire and Statement, applicants, as a matter of practice, must appear for a personal interview before a member of the Committee on Character and Fitness. During the course of these interviews, applicants, as authorized by Court of Appeals Rule VIII-2, are questioned further about their "good moral character and general fitness", based upon the affidavits and answers on the Questionnaire and Statement. Plaintiffs alleged that these interviews often involve inquiry into the applicant's political activities, speeches, beliefs and conduct of a personal and private nature. Only a general denial of these allegations has been made in the

answers filed by defendants and no other denial of the validity of these allegations has been presented.

It also is essential to a full understanding of the constitutional claims made here to know who it is who challenges these statutes and why such challenge is made. In this connection we must know who the plaintiffs are and why they are here.

Plaintiffs in the first case are the Law Students Civil Rights Research Council, Inc. and three law students. The organizational plaintiff is a non-profit membership corporation organized under the laws of the District of Columbia with principal offices in New York City. Its principal objectives are: 1) "non-partisan research, study and analysis of the law with a view to eliminate prejudice and discrimination; to defend human and civil rights secured by law; and to make public the conclusions reached through such research"; and 2) to "provide a civil rights program where students may study with and assist members of the legal profession in the civil rights field on behalf of indigent, poor and distressed, or underprivileged litigants on civil rights cases."[12] The membership of the Council consists of law students, approximately 1500, in 60 law schools throughout the country. There are chapters of the organization in the City of New York at the law schools of Brooklyn College, Columbia, Fordham, and New York Universities. Membership in these chapters includes persons who are residents of either the First or Second Judicial Department and who have either applied for or intend to apply for membership in the New York Bar in those departments. The Council sues on behalf of these members. The complaint alleges that the work of the organization can succeed only if law students may freely engage in the organization's activities, uninhibited by the fear of subsequent delay in or denial of admission to practice because of prior

[12] Second Amended Complaint, paragraph 3.

involvement with the organization or its activities. The individual plaintiffs are all law students who plan to apply for admission to the New York State Bar upon graduation from law school.

Plaintiffs in the companion case are three individuals who have taken and passed the written examination required of all applicants for admision to the New York bar and two organizational plaintiffs. Two of the individual plaintiffs reside in the First Judicial Department and one resides in the Second Judicial Department. Two of these individuals have never been arrested and have never been suspended or dismissed from any school or university. One has never been suspended or dismissed from any school or university, but he has been arrested for distributing handbills in Albany, Georgia in the summer of 1963. Two of the plaintiffs are graduates of New York University Law School and one is a graduate of the Columbia University School of Law. One is presently an assistant professor of law at Columbia. Another plaintiff is a member of the staff of the Columbia University Center on Social Welfare Policy and Law. One has a master's degree in law.

The Columbia Law Students Guild, one of the organizational plaintiffs, includes law students attending Columbia University School of Law who have not yet graduated from law school and who have not yet taken steps to gain admission to the bar other than their pursuit of the required law studies. These students intend to apply for admission to the bar upon completing law school. The organization also includes students who have completed law school and who have applied for admission to the bar. The other organizational plaintiff includes in its membership law students from the various law schools in New York City. It is a chapter of the National Lawyers Guild. Both organizational plaintiffs are non-profit organizations devoted in the main to the promotion of law reform, facilitation of the

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administration of justice, and the protection and fostering of civil rights and liberties.

But, more specifically, as related to the issues raised in this case, the Law Students Guild actively seeks to involve its members in the work of civil rights, civil liberties, and poverty organizations. The National Lawyers Guild, with which both organizational plaintiffs are affiliated, adopted a resolution at its national convention in July 1968 "which places particular emphasis on the concern of lawyers with the war in Vietnam, the draft, racism, and the crises of the poverty and the urban ghettos." [13] It is alleged in the complaint that the New York Chapter "seeks solution to these problems through a radical change in the structure of the nation's legal, political and economic system." [14] It is further alleged that in connection with these objectives, the members of the New York Chapter "have engaged and will engage in many activities not traditionally undertaken by other bar associations." [15] As in the first action, the complaint alleges that these organizations can succeed in their program objectives only if law students feel free to engage in such activities uninhibited by the fear of subsequent delay or denial of admission to practice because of affiliation with these organizations. Both of these organizations likewise sue on behalf of their members who have applied or who will be applying for admission to the bar.

All three organizational plaintiffs have the same standing to sue on behalf of their members as that found in the case on which they rely. N.A.A.C.P. v. Alabama, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958). A close look at plaintiffs makes clear that they are not concerned here with whether a law student who has stolen money from his employer or who has murdered his mother may, nevertheless, be admitted to the bar. They are plainly concerned

[13] Amended Complaint paragraph 7b.

[14] *Id.*

[15] *Id.*

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with whether political tests may be employed in determining eligibility.

Plaintiffs have moved for summary judgment. Defendants have answered and have moved to dismiss. There is no genuine issue as to any material fact alleged in the complaint, including the questions used by the respective character committees prior to and at the time the suits were filed and the questionnaires as amended and revised since the institution of these actions. Plaintiffs are entitled to judgment as a matter of law and, consequently, to the injunction they seek. Clemons v. Board of Education of Hillsboro, 228 F.2d 853 (6th Cir. 1956), cert. den. 350 U.S. 1006, 76 S.Ct. 651, 100 L.Ed. 868; Henry v. Greenville Airport Commission, 284 F.2d 631 (4th Cir. 1960); United States v. Beaty, 288 F.2d 653 (6th Cir. 1961); Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966).

II. *The First Statute*

On the merits of the questions which the court finds dispositive of this case, plaintiffs must prevail.[16] If plaintiffs

[16] Plaintiffs also claim that: 1) the personal interview and character affidavits regarding home life which are required violate rights secured by the Fourth, Fifth, Ninth and Fourteenth Amendments; 2) the oaths required and disclosures compelled violate the Fifth and Fourteenth Amendments; 3) the statutes, rules and regulations and practices violate the Sixth and Fourteenth Amendments' guarantee of the right to the effective assistance of counsel and the independence of the bar; 4) the admission procedures do not comply with due process of law guaranteed by the Fourteenth Amendment in that they permit denial or delay of admission to the bar without providing for notice of charges, a full hearing at which counsel may be present, an opportunity for confrontation and cross examination, and specification of findings. The latter claim was made, in the main, in Willner v. Committee on Character and Fitness, 373 U.S. 96, 83 S.Ct. 1175, 10 L.Ed.2d 224 (1963). Plaintiffs claim that defendants have not taken any action to comply with the *Willner* decision. That case held defendants' procedures lacking in due process since they failed to provide applicant with a hearing on the reasons for denial of his admission. Although defendants did not reply to this serious charge, it seems that a determination of this issue should await a case in which the procedural due process issue is clearly raised by the facts.

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had brought these cases a decade or more ago, i.e., prior to the first Konigsberg v. State Bar of California, 353 U.S. 252, 77 S.Ct. 722, 1 L.Ed.2d 810 (1957), it is doubtful they could have found sufficient precedent with which to convince a court of the validity of their claims.[17] Today, however, a decade after Schware v. Board of Bar Examiners of State of New Mexico, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed2d 796 (1957) and the first *Konigsberg* case, in which the identical issues lurked, plaintiffs' briefs sparkle with the jewel-like precedents of the intervening years in clearly analogous contexts. Waving their First Amendment freedoms on high—especially freedom to believe what one will, freedom of association, and the right to privacy in one's home—plaintiffs carry the banner for lawyers to have the same protection against state infringement upon these areas as has been won for public employees (especially teachers), Shelton v. Tucker, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960); Cramp v. Board of Public Instruction, 368 U.S. 278, 82 S.Ct. 275, 7 L.Ed.2d 285 (1961); Baggett v. Bullitt, 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964); Elfbrandt v. Russell, 384 U.S. 11, 86 S.Ct. 1238, 16 L.Ed.2d 321 (1966); Keyishian v. Board of Regents, supra, Whitehill v. Elkins, 389 U.S. 54, 88 S.Ct. 184, 19 L.Ed.2d 228 (1967); other licensed professions such as merchant seaman, Schneider v. Smith, 390 U.S. 17, 88 S.Ct. 682, 19 L.Ed.2d 799 (1968); Negroes, NAACP v. Button, *supra,* Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539, 83 S.Ct. 889, 9 L.Ed.2d 929 (1963); Bates v. Little Rock, 361 U.S. 516, 80 S.Ct. 412, 4 L.Ed.2d 480 (1960); NAACP v. Alabama, *supra;* other civil rights advocates, Dombrowski v. Pfister, *supra;* Communists, Aptheker v. Secretary of State, 378 U.S. 500, 84 S.Ct. 1659, 12 L.Ed.2d. 992 (1964); veterans, Speiser v. Randall, 357 U.S. 513, 78 S.Ct. 1332, 2

[17] Note, Inquiries Into The Political Beliefs and Activities of Applicants For Admission To The Bar, 1 Colum. Survey of Hum. Rts. L. 33, 45 (1967-1968).

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L.Ed.2d. 1460 (1958); and the population in general, Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).

The first statute, attacked by plaintiffs on the grounds of vagueness and broadness, provides that an applicant who has passed the written examination should be admitted to the bar if the appellate division to which he has applied "shall be satisfied that such person possesses the character and general fitness requisite for an attorney and counselor at law."

In the second *Konigsberg* case, 366 U.S. 36, 81 S.Ct. 997, 6 L.Ed.2d 105 (1961) the good moral character standard was again involved as it had been in the *Schware* case and the first *Konigsberg* case, *supra*. In none of these cases, however, was the "good moral character" standard, *per se*, drawn into question as it is here on the grounds of vagueness and broadness. And since that time, the concepts of vagueness and broadness have not yet been applied by the Supreme Court to this standard or any other bar admission standard as they have been applied recently to statutes and oaths required of persons seeking public licenses or employment or assuming public office. Schneider v. Smith, *supra*; Cramp v. Board of Public Instruction, *supra*; Baggett v. Bullitt, *supra*; Elfbrandt v. Russell, *supra*; Keyishian v. Board of Regents, *supra*; Whitehill v. Elkins, *supra*.

In the second *Konigsberg* case, *supra*, 366 U.S. at 40, 81 S.Ct. at 1001, Mr. Justice Harlan, writing for the majority, pointed out that the validity of the requirement that an applicant for admission to the bar bear the burden of proof of "good moral character" had not been drawn into question there. He also noted that the requirement could not "well be drawn in question", citing the fact that such a requirement exists in all the states. But there was drawn in question the right of the state to put upon an applicant the burden of proving that he had not advocated

the overthrow of government by force and violence. In this connection, Mr. Justice Harlan pointed out that Konigsberg did not challenge the constitutionality of the California statute which forbade certification for admission to the bar of those who so advocated. The majority held, however, that the burden of proof on this issue had not been put upon applicants but upon the state and that in this connection an applicant could not obstruct a committee's inquiry into lawful standards of admission by refusing to answer questions. Konigsberg had refused to answer the question whether he had been a member of the Communist Party on the ground that the First Amendment protected him in his refusal to answer, although he swore that he had never advocated the overthrow of government by force. The majority disagreed with Konigsberg's First Amendment claim. Using a balancing test, the majority held that "the State's interest in having lawyers who are devoted to the law in its broadest sense, including not only its substantive provisions, but also its procedures for orderly change, was clearly sufficient to outweigh the minimal effect upon free association" occasioned by the compulsory disclosure of political party membership in that case.

We, therefore, review here for the first time the moral character standard and the other bar admission standards involved here in the light of the vagueness and broadness concepts which the high Court has applied to other First Amendment cases since the second *Konigsberg* case, without reference to the obstruction rule or the balancing test used there.

The term "good moral character" has not been defined by the New York courts and counsel for defendants have not offered any definition. The term "general fitness" has been defined in only one case as follows: "* * * the words 'general fitness' have rather to do with a man's general experience in life, his family life, his associates,

his business or other experience, his general reputation and the like." Application of Brennan, 230 App. Div. 218, 227, 243 N.Y.S. 705, 715 (2nd Dept. 1930). And in one case it does appear that an applicant was disqualified on political grounds, *inter alia,* pursuant to the "general fitness" criterion, Application of Cassidy, 268 App.Div. 282, 51 N.Y.S. 2d 202 (2nd Dept. 1944). In that case, the applicant was an anti-communist who urged the creation of private armies to combat communism.

Even the Supreme Court in the first *Konigsberg* case, *supra,* and in *Schware, supra,* did not agree upon the meaning of the words "good moral character". There the Court acknowledged that this "unusually ambiguous" standard, "can be defined in an almost unlimited number of ways" and can be "a dangerous instrument for arbitrary and discriminatory denial of the right to practice law." 353 U.S. at 263, 77 S.Ct. at 728. In the first *Konigsberg* case, the Court assumed, without deciding, for the purposes of that case that the proper definition was the one proposed by the state's counsel, i. e., "honesty, fairness and respect for the rights of others and for the laws of the state and nation," 353 U.S. at 264, 77 S.Ct. at 728. The Court took pains to point out that "neither the definition [of good moral character] proposed by counsel nor those appearing in the California cases equates unorthodox political beliefs or membership in lawful political parties with bad moral character." 353 U.S. at 263-264, 77 S.Ct. at 728. The Court also pointed out that the California cases appeared to define " 'good moral character' in terms of an absence of proven conduct or acts which have been historically considered as manifestations of 'moral turpitude' " 353 U.S. at 263, 77 S.Ct. at 728. Mr. Justice Frankfurter, however, in his concurring opinion in *Schware, supra,* offered this definition: "From a profession charged with such responsibilities there must be

exacted those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have throughout the centuries, been compendiously described as 'moral character.'" 353 U.S. at 247, 77 S.Ct. at 761. These definitions are, obviously, still subject to attack on vagueness grounds, but they at least define some of those qualities which might be demanded of lawyers.[18] Professor Walter Gellhorn of Columbia Law School has suggested that the standard for assessing the character of bar applicants be "dishonorable conduct relevant to the occupation" rather than good "moral" character.[19] The few New York cases in which applicants have been rejected on character grounds lend support to Mr. Justice Frankfurter's as well as Professor Gellhorn's view.[20]

In any event, it seems clear that a statutory framework which requires as a standard for admission to the bar that applicants possess the "character and general fitness requisite for an attorney", although vague, is not so vague, in the light of the foregoing definitions and its long and

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[18] *Id.* at page 40.

[19] W. Gellhorn, Individual Freedom and Governmental Restraint 150 (1956).

[20] In the cases decided by the New York courts in which applicants have been barred, it is clear that in each the conduct made the basis for refusal to admit has been dishonorable conduct relevant to the legal profession: e.g. Re Peters, 221 App.Div. 607, 225 N.Y.S. 144, aff'd 250 N.Y. 595, 166 N.E. 337, rearg. denied, 252 N.Y. 572, 170 N.E. 148 (1927) (admission denied because of disbarment in another state); Re Greenblatt, 253 App.Div. 391, 2 N.Y.S.2d 569 (1938) (admission denied because of misrepresentations to character committee about applicant's dismissal from college for misconduct); Application of Cassidy, 268 App.Div. 282, 51 N.Y.S.2d 202, aff'd on rehearing, 270 App.Div. 1046, 63 N.Y.S.2d 840, aff'd, 296 N.Y. 926, 73 N.E.2d 41 (1944) (admission denied because applicant urged creation of armed units for forceful overthrow of government and made inconsistent statements indicating lack of veracity).

proper application in many cases, as to be unconstitutional on its face on the ground of vagueness.

We must, therefore, examine the manner in which the good moral character statute has been construed, implemented and applied by the defendant courts and their respective character committees. With the statute and the Court of Appeals Rule VIII as a guide, defendants have adopted vague and overly broad regulations and procedures which have resulted in a broad and sweeping inquiry into the background of bar applicants. These applicants have been required to answer questions which are vague and broad in violation of constitutional rights. cf. Schneider v. Smith, *supra*. As writers have pointed out, the terms vagueness and broadness actually involve three related problems. Note, The Void for Vagueness Doctrine in the Supreme Court, 109 U.Pa.L.Rev. 67 (1960). A question may leave an applicant guessing as to its meanings. This is referred to as conventional vagueness.[21] Examples of this are revised Question 31, *supra*, which reads: "Is there any incident in your life not called for by the foregoing questions which has any favorable or detrimental bearing on your character or fitness?"; and revised Question 27(a), *supra*, which reads: "Do you believe in the principles underlying the form of government of the United States of America?" cf. Baggett v. Bullitt, *supra*.

Secondly, a question may ask the applicant for too much information, such as those cited, supra, as having been deleted by defendants, asking for a listing of membership in all organizations and a detailing of activities in each over an indefinite period of years, leaving the person questioned guessing as to the relevance of what is asked. This is one type of broadness.[22] Shelton v. Tucker, *supra*. Another example of this is Question 9 of the Second Depart-

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[21] Note, 1 Colum. Survey of Hum. Rts. L., at [pp. 54-55, *supra*] footnote 16.

[22] *Id.*

ment's present affidavit form: "Have you visited applicant's (a) parental home, (b) marital home, (c) any other home or place of abode applicant may have had?"

Finally, a question may define carefully the information it seeks, such as membership in the Communist Party, but cover both constitutionally protected and unprotected activity; this other type of broadness is sometimes called overbreadth.[23] Such overbreadth applies to present Question 26, *supra*, relating to membership in organizations which advocate overthrow of government by force. Recent Supreme Court decisions make it abundantly clear that neither Communist Party membership or any other membership can be used to deny admission to the bar without a showing that the applicant knows of the organization's unlawful objectives and has joined with or has acquired " 'specific intent' to further the illegal aims of the organization." Elfbrandt v. Russell, *supra*; Keyishian v. Board of Regents, *supra*; cf. Aptheker v. Secretary of State, *supra*; Haskett v. Washington, 294 F.Supp. 912 (D.D.C., Dec. 4, 1968).

Consequently, the regulations adopted by defendants, i.e., the affidavit forms and the questionnaire, fail to meet the standard of precision applicable to state regulations touching upon First Amendment freedoms. The standard was enunciated by the Supreme Court in NAACP v. Button, *supra*, where the Court ruled that "standards of permissible statutory vagueness are strict in the area of free expression," 371 U.S. at 432, 83 S.Ct. at 337, and that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." 371 U.S. at 438, 83 S.Ct. at 340. More recently, the Court reiterated that ruling in *Keyishian*, by quoting this passage from the *Button* case: "Because First Amendment Freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."

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[23] *Id.*

371 U.S. at 433, 83 S.Ct. at 338. The Court then quoted from another decision in this area which is also singularly applicable here: "When one must guess what conduct or utterances will lose him his position, one necessarily will 'steer far wider of the unlawful zone • • •' Speiser v. Randall, 357 U.S. 513, 526 [78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460]." 385 U.S. at 604, 87 S.Ct. at 684. For "[t]he threat of sanctions may deter • • • almost as potently as the actual application of sanctions." NAACP v. Button, 371 U.S. at 433, 83 S.Ct. at 338. See also, United States v. Robel, 389 U.S. 258, 88 S.Ct. 419, 19 L.Ed.2d 508 (1967); Dombrowski v. Pfister, *supra;* cf. Aptheker v. Secretary of State, *supra.* Mr. Justice Black's incisive observation in his dissenting opinion in the second *Konigsberg* case is apposite here: "If every person who wants to be a lawyer is to be required to account for his associations as a prerequisite to admission in to the practice of law, the only safe course for those desiring admission would seem to be scrupulously to avoid association with any organization that advocates anything at all somebody might possibly be against, including groups whose activities are constitutionally protected under even the most restricted notion of the First Amendment." 366 U.S. at 73-74, 81 S.Ct. at 1919.

It is clear from all the questions cited, *supra,* that in applying the statutes attacked here, there has been an improper focus upon the applicant's political beliefs and associations and the improper use of a political test in determining admissions to the bar. Such an unlimited political focus and the use of a political test pursuant to a "good moral character" standard is foreclosed by the Supreme Court's decisions. In *Schware, supra,* the Court said: "Obviously an applicant could not be excluded merely because he was a Republican or a Negro or a member of a particular church." 353 U.S. at 239, 77 S.Ct. at 756. As the Court there made clear, the focus must be on

the applicant's illegal political activity, if any, and the disqualification must be on this ground, not his political beliefs or associations.

There also has been an improper invasion of the right of privacy. The hallmark of civilization is that when a man closes the door to his home and retreats to the privacy thereof the eyes and ears of the state remain outside. Griswold v. Connecticut, *supra*. The state simply cannot ask every affiant who supports an applicant for admission to the bar with whom the applicant lives or what the inside of his parents' home is like. There must be some specific information relating to those qualities expected of one about to enter the legal professions before these questions can be asked of a particular applicant. Gibson v. Florida Legislative Investigation Committee, *supra*. Of course the state can, as it long has, require of applicants for admission to the bar that they have the "character and general fitness requisite for an attorney and counsellor at law." But these statutory words must be given such definition and application by defendants as will suggest to applicants and affiants "dishonorable conduct relevant to" the legal profession, not invasions of personal privacy and political beliefs and associations protected by the Constitution. As the Court said in Shelton v. Tucker, *supra*, "* * * even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." 364 U.S. at 488, 81 S.Ct. at 252. And in *Keyishian*, the Court said: "The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform [lawyers] what is being proscribed." 385 U.S. at 604, 87 S.Ct. at 684.

This judge, therefore, holds that the "character and general fitness" statute is constitutional, but its inter-

pretation, implementation and application by the defendant courts and their respective character committees are unconstitutional.

III. *The Second Statute*

The second statute attacked here provides that an applicant for admission to the bar must furnish satisfactory proof to the effect that "he believes in the form of government of the United States and is loyal to such government." N.Y.C.P.L.R. Rule 9406. This is clearly a political test for determining admission to the bar in violation of rights secured by the First and Fourteenth Amendment to the federal constitution. cf. Torcaso v. Watkins, 367 U.S. 488, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961). "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." West Virginia State Board of Education v. Barnette, 319 U.S. 624, 642, 63 S.Ct. 1178, 1187, 87 L.Ed. 1628 (1943). The "First Amendment gives freedom of mind the same security as freedom of conscience." Thomas v. Collins, 323 U.S. 516, 531, 65 S.Ct. 315, 323, 89 L.Ed. 430 (1944). It is simply too late in our constitutional history to try to reconcile the requirements of Rule 9406 with the constitutional axiom "that one be permitted to believe what he will." American Communications Ass'n v. Douds, 339 U.S. 382, 412, 70 S.Ct. 674, 691, 94 L.Ed. 925 (1950). All that Rule 9406 does is "[t]o force the Bar to become a group of thoroughly orthodox, time-serving, government-fearing individuals * * * [and] to humiliate and degrade" the Bar. In re Anastaplo, 366 U.S. 82, 115-116, 81 S.Ct. 978, 996, 6 L.Ed. 2d 135 (1961) (Mr. Justice Black dissenting). It is nothing short of a complete irony that lawyers who fought for and won constitutional protections for other professions are the last to receive protection for themselves.

Rule 9406 is also unconstitutional on its face for another obvious reason. In an area patently involving First Amendment rights where the consequences of failure of proof are severe and the matter to be proved is difficult of definition, the burden of proof is explicitly upon the applicant to prove that he is loyal to the government. Speiser v. Randall, *supra*.

The statute, itself, Rule 9406, says: "No person shall receive said certificate [of character and fitness] from any committee and no person shall be admitted to practice as an attorney and counselor at law in the courts of this state, unless he shall furnish satisfactory proof to the effect: 1) that he believes in the form of government of the United States and is loyal to such government." There is simply no room for the conclusion, which the majority reached in the second *Konigsberg* case, *supra*, that the state has *not* put the burden of proof on the applicant; there it is in plain language not subject to attack on grounds of vagueness. It is clearly not a burden of simply coming forward with some evidence or going forward once the state has made out a prima facie case. Where is that in the statute or evidence before us?

Present Question 26 (relating to membership in organizations advocating overthrow of the government by force) and the present oaths required in the Questionnaire and Statement (relating to the substance of C.P.L.R. 9406) is the method by which this burden is initially put upon the applicant. The answers given to Question 26 and the oaths, which are in the form of yes and no questions, may lead to further questioning upon the personal interview. This has never been seriously denied by defendants and is clearly authorized by the requirement that an investigation be made. N.Y.C.P.L.R., Rule 9401. Consequently, in this case, as in Speiser v. Randall, *supra*, more is involved than the taking of a conclusive oath of

non-criminal political conduct such as was involved in the oath cases referred to by the majority here as justification for requiring the second question oath of lawyers. In those cases, the Supreme Court sustained the validity of loyalty oaths required of public employees, Garner v. Board of Public Works, 341 U.S. 716, 71 S.Ct. 909, 95 L.Ed. 1317 (1951); candidates for public office, Gerende v. Board of Supervisors, 341 U.S. 56, 71 S.Ct. 565, 95 L.Ed. 745 (1951); and officers of labor unions, American Communication Ass'n v. Douds, *supra*. But, as the majority points out in *Speiser*, "If the person took the oath he retained his position. The oath was not part of a device to shift to the office holder the burden of proving his right to retain his position." *Id.* 357 U.S. at 528, 78 S.Ct. at 1343. Here as in *Speiser*, the answers to questions 26 and the oath questions are "only a step in a process throughout which the [applicant] must bear the burden of proof." *Id.* The applicant may be questioned indefinitely and may be required to produce additional affidavits. In this process, an applicant must obviously defend his negative answer, expose and defend his writings, his speeches, his membership in various organizations and his political beliefs.

The procedures here do not involve a standard of proof which would require the character committees to go forward to prove disqualification on grounds of illegal political activity once the applicant has made a prima facie case. The committee may delay its interrogation indefinitely or deny admission altogether, as the Questionnaire and Statement warn, for failure to answer fully any question.

Defendants, in their brief, do not even make an attempt to dull the luster of one of plaintiffs' brightest gems, Speiser v. Randall, *supra*; for there is the heart of plaintiffs' case. Questions relating to loyalty to the government

clearly tread upon First Amendment territory. Consequently, as the Court said in *Speiser*, "Where the transcendant value of speech is involved due process certainly requires in the circumstances of this case that the State bear the burden of persuasion" to show that the applicant is guilty of illegal political conduct. "The vice of the present procedure is that, where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized." 357 U.S. at 526, 78 S.Ct. at 1342.

The burden of proving loyalty to the government here, as in *Speiser*, can have but one effect on a prospective lawyer's First Amendment freedoms, and that is a chilling effect if not a freezing one. "The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens." *Id.* at 526, 78 S.Ct. at 1342. See also Elfbrandt v. Russell, *supra*, 384 U.S. at 17-18, 86 S.Ct. 1238, and Abington School District v. Schempp, 374 U.S. 203, 289-290, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963). (Mr. Justice Brennan concurring). Moreover, a person who must spend long years in preparation and invest large sums of money to enter the legal profession is clearly going to be more prone "to steer far wider of the unlawful zone."

Here an applicant for admission to the bar has the burden of proving that he is loyal to the government. If in the opinion of some members of the character committee he should fail in this burden, he is denied the requisite certificate. This means that the applicant is denied the opportunity to enter the profession for which he has spent large sums of money and much time in study. "So far as I am concerned the consequences to the applicant whether considered from a financial standpoint, a

social standpoint, or any other standpoint I can think of, constitute a more serious 'penalty' than that imposed upon Speiser," Konigsberg v. State Bar of California, *supra*, 366 U.S. at 77, 81 S.Ct. at 1021, Mr. Justice Black dissenting.

If, as in *Speiser*, the state cannot constitutionally impose upon a veteran seeking a tax exemption the burden of proving loyalty to our government, by what reasoning can the state constitutionally impose such burden on one seeking a license to practice law? Defendants did not answer this question to the satisfaction of this court and did not cite any case to sustain their position other than the second *Konigsberg* case where the Court explicitly found the burden was not on the applicant.

Finally, Rule 9406 is likewise unconstitutional on its face since it lacks sufficient standards for determining who shall be admitted to the bar. It has that same quality of "extraordinary ambiguity" condemned by the Court in describing the statutory framework in *Keyishian, supra*, 385 U.S. at 604, 87 S.Ct. 675. There vague statutory language was held unconstitutional. One statute required the discharge of a teacher for "the utterance of any treasonable or seditious acts or words or the doing of any treasonable or seditious act", *Id.* at 593, 87 S.Ct. at 678. Another statute barred persons from employment as teachers who "by word of mouth or writing wilfully and deliberately advocates, advises or teaches the doctrine" of forceful overthrow of government. *Id.* at 599, 87 S.Ct. at 682. The language of Rule 9406 is equally vague. The language of Rule 9406 is "wholly lacking in 'terms susceptible of objective measurement.'" *Id.* at 604, 87 S.Ct. at 684. And "men of common intelligence must necessarily guess at its meaning and differ as to its application * * *." Baggett v. Bullitt, *supra*, 377 U.S. at 367, 84 S.Ct. at 1320. The words "loyal to such govern-

ment" are no more definite than the phrase " 'respect for * * * the institutions of the United States of America * * * and undivided allegiance to the government * * *' " found lacking in ascertainable standards in *Baggett*. *Id.* at 361, 84 S.Ct. at 1317.

Pursuant to this vague statute, defendants require applicants on the Questionnaire and Statement to answer these questions: "Do you believe in the principles underlying the form of government of the United States of America? Can you conscientiously, and do you, affirm that you are, without any mental reservation, *loyal to and ready to support the Constitution of the United States?*" The italicized words constitute the amended portion of this oath. This amendment was made just prior to the filing of these actions. This second question formerly read: "Can you conscientiously and do you affirm that you are, without any mental reservation, loyal to the Government of the United States?" The first question was also amended to delete the requirement that the applicant write, in not less than 100 words, what he believes those principles underlying our form of government to be. These amendments, however, do not rescue these oaths from the stamp of unconstitutionality.

These questions are oaths for purposes of perjury under New York law. Under the law, oath includes an affirmation N.Y. Penal Law, McKinney's Consol. Laws, c. 40, § 210.00. When an applicant answers the second question in the affirmative he has unquestionably taken an oath. Moreover, applicants are warned that the statement is one made under oath. Consequently, when the applicant answers the first question, *supra*, and then swears or affirms at the end of the Questionnaire and Statement, as required, to the truth of his affirmative answer, the applicant has taken an oath to which the penalties for perjury attach, the same as in Whitehill v. Elkins, *supra*, and Elfbrandt v. Russell, *supra*.

If the oath required in Whitehill v. Elkins, *supra*, ("I am not engaged in one way or another in the attempt to overthrow the government of the United States") is constitutionally unacceptable for teachers because too vague and broad when read in the light of the membership statute to which it was tied; and if the oath in Baggett v. Bullitt, *supra*, ("I will * * * promote respect for the flag and the institutions of the United States * * * and undivided allegiance to the government") cannot constitutionally be required of teachers because it is also vague and broad; and if the oath required of teachers in Cramp v. Board of Public Instruction, *supra* ("I have not and will not lend my aid, support, advice, counsel or influence to the Communist Party") is likewise vague and broad; pursuant to what rationale shall lawyers be required to take the vague and broad oaths here? It has been suggested that there is none and that there is more reason for applying generous First Amendment standards in bar admission cases than in public employment cases.[24] The most important reason is that teachers, for example, are employees of the state while lawyers are employed by their clients to whom they owe their first obligation. This difference would seem to justify greater regulation of teachers than lawyers. Lawyers are officers of the court only in the sense that they are subject to the discipline of the court and are under an obligation not to hinder the administration of justice. Teachers and other public employees are employed directly by the state which thus has the added interest of an employer. The majority here holds that lawyers are in a special category and may, therefore, be required to take an oath such as those upheld as to "a limited class of persons in or aspiring to public positions by virtue of which they could, if evilly motivated, create serious danger to the public safety." *Garner, supra*;

[24] *Id.* at 52.

Gerende, supra; American Communications Ass'n, *supra.* But the majority pointed out in Speiser v. Randall, *supra,* that in those cases there was no attempt directly to control speech, as in the instant case, but rather to protect, from some evil shown to be grave, some interest clearly within the sphere of governmental concern. What danger to the public is actually created by a "subversive" lawyer? Again, this question has been thoroughly examined.[25] The conclusion is that the danger is small and that, in any event, adequate remedies in the form of criminal penalties and disbarment already exist to punish and deter irresponsible conduct.

Finally, it seems clear that a determination as to the vagueness and broadness of these oath questions must be undertaken as a necessary requisite to any consideration of the obstruction by an applicant of the investigative process by refusing to answer these oath questions. cf. Whitehill v. Elkins, *supra.* Rule 9406's language, "loyal to such government" and the first question's language, "principles underlying the form of government" are certainly broad enough to encompass constitutionally protected dissent and protest activity against certain governmental policies and principles. There has been no attempt by statute, rule, regulation, or court decision to enlighten anyone as to what utterances or what activities may be construed as disloyalty to our government or contrary to the principles underlying our form of government. Clearly, law students who dissent from this government's policies with respect to the war in Vietnam have a ground for concern as to whether they are loyal to the government. "It is no answer to say that the statute would not be applied in such a case. We cannot gainsay the potential effect of this obscure wording on 'those with a conscience and scrupulous regard for such undertakings.'" *Keyishian, supra,* 385 U.S. at 599, 87 S.Ct. at 681.

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[25] *Id.* at 40.

As to the oaths embodied in the two questions, defendants argue that examination of the New York statutory scheme discloses that both the Legislature and the Court of Appeals treat members of the bar as officers of the courts who, as such, are required to take the constitutional oath of office. Accordingly, say defendants, the requirements of C.P.L.R. 9406, that a person shall not be admitted to the bar unless he furnishes "satisfactory proof to the effect that he believes in the form of government of the United States and is loyal to such government" must be construed in harmony with its purpose, i.e., to test merely that the applicant, if approved, can truly and honestly take the constitutional oath of office. Thus, defendants plead, C.P.L.R. 9406 may not be deemed to be either vague or unconstitutional; it merely requires, in substance, that a law officer-to-be affirm that he believes in and is loyal to our constitutional form of government the same as any judge or other state officer.

In reply, plaintiffs' points are exceedingly apt. First, there is no attack made here upon the requirement that every person upon being admitted to the bar take the promissory oath given to all state officers to support the state and federal constitutions which is required by the New York Constitution, Article XIII, § 1. New York Judiciary Law § 466.[26]

Secondly, plaintiffs say that the attempt to save these vague oaths as to belief by assimilation with the constitutional oath of office cannot succeed. The fact is that the authority to prescribe these oaths derives from C.P.L.R. 9406 which is a statutory prerequiste for admission to the

[26] "I do solemnly swear (or affirm) that I will support the Constitution of the United States, and the Constitution of the State of New York, and that I will faithfully discharge the duties of the office of ....., according to the best of my ability." N.Y.Const., Art. XIII, § 1.

bar and, consequently, must be considered with reference thereto and not with reference to the Constitutional oath already required of lawyers and to which plaintiffs do not object. Even if we accept defendants' contention that C.P.L.R. 9406 and these oaths must be construed in light of the constitutional oath, as the Court said in Whitehill v. Elkins, *supra*, 389 U.S. at 61-62, 88 S.Ct. at 187 the statute and these oaths are still "befogged". We find here, as the Court found there, "an overbreadth [discussed supra] that makes possible oppressive or capricious application" as character committee personnel and appellate division justices change. That very threat may deter the unfettered exercise of First Amendment freedoms by law students as much as successive suits for perjury. This statute and these oaths are just another classic example of the often cited need for legislation drawn with precision in this sensitive and important First Amendment area. cf. Whitehill v. Elkins, *supra*.

The distinction between promissory oath and test oath of the kind here involved was recognized long ago. Ex parte Garland, 71 U.S. (4 Wall.) 333, 18 L.Ed. 366 (1866). The oaths involved here are not promissory oaths to support the Constitution of the State and the United States as in the case of the constitutional oath. The fact that these oaths are in the form of "yes" and "no" questions is of special significance. If the applicant does not give the desired answer, which in this case is "yes", he may be questioned further, delayed in his admission, or disqualified without further questioning. He is warned of this on the front of the Questionnaire and Statement. In short, he must carry the burden of proof that he is qualified for admission. These oaths are not simply a promise to support the Constitution. These are oaths which require an applicant to disclaim past or present constitutionally protected political beliefs or activities. It is for this reason, i.e.,

that these oaths are too vague and too broad, that they cannot be equated with the constitutional oath.

Finally, plaintiffs "strike home" with another gem out of their storehouse of recent precedent, Bond v. Floyd, 385 U.S. 116, 87 S.Ct. 339, 17 L.Ed.2d 235 (1966). There the state had claimed, as here, the right to examine the officer-to-be to test his sincerity and ability to take the constitutional oath there prescribed. The Court ruled in response to this claim in the *Bond* case, at 132, 87 S.Ct. at 347, that such a power could not be conceded because of its obvious susceptibility to abuse which it went on to demonstrate. Again, the Court made clear that there must be some specific evidence of the prospective officer's inability to take the oath before any such inquiry becomes proper. It simply cannot be done in every case.

APPENDIX D

Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

68 Civ. 2917

LAW STUDENTS CIVIL RIGHTS RESEARCH COUNCIL, INC., *et al.*,
Plaintiffs,

against

LOWELL WADMOND, *et al.*,
Defendants.

68 Civ. 2938

STEPHEN MARTIN WEXLER, *et al.*,
Plaintiffs,

against

THE SUPREME COURT OF THE STATE OF NEW YORK, Appellate Division, First Judicial Department, *et al.*,
Defendants.

The plaintiffs in 68 Civ. 2917, Law Students Civil Rights Research Council, Inc., *et al.*, having commenced an action on their own behalf and, pursuant to Rule 23, F.R.C.P., on behalf of all others similarly situated, seeking declaratory and injunctive relief against the enforcement of Statutes and Rules of the State of New York delegating to the defendants Supreme Court of the State of New York, Appellate Division, First Judicial Department and the Com-

mittee on Character and Fitness appointed by it, the authority to examine and certify persons qualifying for admission to the Bar of the State of New York, and plaintiffs having challenged the application of such Statutes and Rules as embodied in the form of Questionnaires and oral interviews conducted by said Court and Committee, and plaintiffs Law Students Civil Rights Research Council, Inc., *et al.*, having moved for convocation of a three-judge court pursuant to 28 U.S.C. §§ 2281, 2284 and for a declaratory judgment and a preliminary and permanent injunction on the grounds that the New York Statutes and Rules, on their face and as applied, violated the plaintiffs' rights under the Fourteenth Amendment to the United States Constitution; and

Plaintiffs in 68 Civ. 2938, Stephen Martin Wexler, *et al.*, having commenced an action seeking declaratory and injunctive relief against the defendants Supreme Courts of the State of New York, Appellate Divisions, First and Second Judicial Departments and the Committees on Character and Fitness thereof, contending that the State Statutes and Rules empowering the defendant Courts and their Committees to establish procedures for applications for admission to the New York State Bar were vague and overbroad in violation to the Fourteenth Amendment, and that the New York Statutes and Rules as applied by the defendant Courts and Committees, in the written Questionnaires promulgated by them and in the personal interviews conducted of applicants, were unconstitutional as written and as applied; and said plaintiffs having moved for the convocation of a three-judge court pursuant to 28 U.S.C. §§ 2281, 2284 and for a preliminary injunction and declaratory judgment; and

Honorable Constance Baker Motley, District Judge, on September 25, 1968 having granted plaintiffs' separate motions to convene a three-judge court, and this Court

having convened for argument of the respective motions by plaintiffs on November 13, 1968, at which time the above actions were consolidated; and

Defendants having moved to dismiss the complaints on the grounds that this Court lacked jurisdiction over the persons of the defendants, and over the subject matter of these actions, and the defendants having contended that this three-judge court was not properly convened, and the defendants having moved to dismiss the complaints for failure to establish a claim under the United States Constitution or under Federal Law; and

This Court having rendered its opinion on February 17, 1969, holding that it did have jurisdiction to reach the merits of the claims asserted in the complaints, and holding further that the Statutes and Rules challenged in these actions were and are constitutional on their face but that certain questions then being utilized in the Questionnaires were inconsistent with the Fourteenth Amendment to the Constitution of the United States; and the defendants having been directed to file a report within ninety (90) days after the rendering of this Court's decision setting forth the steps taken to implement that decision; and the defendants having filed a report dated May 14, 1969, hereto annexed, setting forth changes which have been adopted in the form of Questionnaire; it is finally ORDERED, ADJUDGED AND DECREED (1) That this Court was properly convened and has jurisdiction over the subject matter of this action and over the persons of the defendants;

(2) That the New York State Statutes and Rules delegating power to the Supreme Courts, Appellate Divisions and their respective Committees on Character and Fitness to administer admissions to the New York Bar do not violate the Fourteenth Amendment to the United States Constitution on their face;

(3) That Question 27(a) as revised in said report dated May 14, 1969, be further revised to read as follows:

> "Is there any reason why you cannot take and subscribe to an oath or affirmation that you will support the constitutions of the United States and of the State of New York? If there is, please explain."

(4) That the motions of plaintiffs and defendants are granted to the extent herein provided and are otherwise denied;

(5) That no party shall recover costs against any other; and

(6) That this decree is without prejudice to any new action relating to the manner in which the aforesaid procedures are carried out.

Dated: New York, New York
June 16, 1969

HENRY J. FRIENDLY
U.S.C.J.

DUDLEY B. BONSAL
U.S. D.J.

While dissenting in certain respects from the court's opinion, I sign the decree as properly carrying it out.

CONSTANCE BAKER MOTLEY
U.S. D.J.

Filed:
June , 1969

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Clerk